93-603

Supreme Court, U.S.
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No. _____

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1993

GARY BEWLEY,

Petitioner,

v.

BRUCE HOWELL, SUPERINTENDENT; INDEPENDENT SCHOOL DISTRICT NO. 1 OF TULSA COUNTY, OKLAHOMA; BOARD OF EDUCATION OF INDEPENDENT SCHOOL DISTRICT NO. 1 OF TULSA COUNTY, OKLAHOMA; JIMMY REEDER; DOUG DODD; JIM PAYNE; VERNON HOBBS; JUDY McINTYRE; WALTER HUSHBECK; individually and as members of the Board of Education of Independent School District No. 1 of Tulsa County, Oklahoma; and CATHY RODGERS, an individual,

PETITION FOR WRIT OF CERTIORARI FROM THE TENTH CIRCUIT COURT OF APPEALS

Respondents.

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Gary Bewley

QUESTIONS PRESENTED FOR REVIEW

1. Was it reversible error for the Court of Appeals, when properly requested to do so pursuant to FED R. E. 201 (D), to fail to take judicial notice of (a) the Oklahoma School Code's provisions expressing a public policy against discharging an employee for refusal to participate in the alteration of attendance records; (b) the Oklahoma School Code's provisions making the participation of the Board, the Board's Attorneys and other employees in alteration of attendance records criminal and cause for loss of licensure and removal from office and employment; (c) decisions of the Oklahoma Supreme Court construing the subject employment law, making it an actionable tort for an employee discharged for refusing to act in violation of an established and well-defined public policy and providing that determination of the reason for discharge is a jury question; and (d) the Oklahoma State Open Meeting Act?

2. Did Petitioner present sufficient affirmative evidence of genuine issues of disputed material facts to entitle him to a jury trial on all issues: the retaliatory discharge tort, the violation of his civil rights under 42 U.S.C. § 1983, the lack of due process at his pre-termination hearing, the circumstantial evidence of the school district's concerted withholding and destruction of exculpatory evidence, the bias of the board, the lack of good faith of the superintendent and board members and, therefore, their lack of qualified immunity as a matter of law?

3. Did the Court of Appeals fail to carry out a de novo review of the record of the District Court on which the Motion for Summary Judgment denying Petitioner a jury trial on any of his claims, was sustained?

4. Does the nature of the highly publicized and stigmatizing reason for Petitioner's discharge, one uncorroborated alleged act of sexual intercourse by an assistant principal with a 17 year old female student, require the Court to scrutinize the "due process" hearing to determine if Petitioner's discharge were a mistake and based on false charges which left a cloud over his name precluding all future employment?

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Respondents.

PETITION FOR WRIT OF CERTIORARI FROM THE TENTH CIRCUIT COURT OF APPEALS

OPINIONS DELIVERED IN FEDERAL COURTS BELOW

The opinion of the United States District Court for the Northern District of Oklahoma was filed on September 4, 1992. The opinion is contained in Appendix 1 and contains a reference to the findings of the Board Education that Petitioner was discharged for one act of sexual misconduct with Cathy Rodgers, then a seventeen year old student on May 3, 1988. The opinion of the United States Court of Appeals for the Tenth Circuit was filed on July 12, 1993 and is unpublished. The opinion is contained in App. 2.

GROUNDS UPON WHICH JURISDICTION IS INVOKED

The United States District Court for the Northern District of Oklahoma granted Respondents' Motion for Summary Judgment pursuant to FED. R. CIV. P. 56 on all claims both federal civil rights and state law claims, on September 4, 1992. The jurisdiction of that court was based on 28 U.S. § 1343(3). Timely notice of appeal was made

pursuant to FED. R. APP. P. 4(A)(1) and, pursuant to 28 U.S.C. § 1291, the Tenth Circuit Court of Appeals had jurisdiction and entered its order affirming the District Court's order on July 12, 1993. See App. 7.

The Supreme Court of the United States has jurisdiction to hear this case on a Petition for Writ of Certiorari pursuant to 28 U.S.C. §1254(1) which petition is timely filed in accordance with SUP. CT. R. 13. See App. 7.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Under 42 U.S.C. § 1983, Petitioner established the necessary elements of his claim that he was denied due process under the Fourteenth Amendment by a biased tribunal and that both his Fifth Amendment rights and First Amendment right to freedom of speech were abridged by his discharge for refusing to falsify attendance records which acts are criminal in Oklahoma and can result in removal from office and loss of employment and licensure for Superintendents, teachers, Board

members, principals and others. These provisions are found in the Oklahoma School Code:

Okl. Stat. tit. 70 § 1-111 (Laws, 1971); Okl. Stat. tit. 70 § 18-116 (Laws, 1978); Okl. Stat. tit. 70 § 18-117 (Laws, 1980); Okl. Stat. tit. 70 § 18-118 (Laws, 1971); Okl. Stat. tit. 70 § 18-124 (Laws, 1971); Okl. Stat. tit. 70 § 22-110 (Laws, 1971); Okl. Stat. tit. 70 § 22-111 (Laws, 1971); Okl. Stat. tit. 70 § 22-112 (Laws, 1971); Okl. Stat. tit. 70 § 22-113 (Laws, 1971) found at App. 3.

Petitioner also has a Seventh Amendment right to have a jury trial on his claims as a matter of law on a Motion for Summary Judgment pursuant to FED. R. CIV. P. 56. This is found at App. 4 and 6.

Board members and their attorneys violated the State Open Meeting Act, Okl. Stat. tit. 25 § 301 et. seq. with ex parte communications and pre-hearing presentation of evidence so that they had decided how to vote before the hearing. This

is found at App. 3. Responsdents failed to prove by a preponderance of the evidence required by Okl. Stat. tit. 70 § 6-103.9 (1977), see App. 3, that Petitioner had committed an act of sexual misconduct.

STATEMENT OF THE CASE

Before Litigation

Petitioner, Gary Bewley, had been employed as a high school teacher, counselor and assistant principal for 17 years when he was accused by a 17 year old student, Cathy Rodgers of having sexual relations with her on the floor of the bathroom adjacent to his school office during 6th hour on a school day on May 3, 1988. This matter was investigated by Bewley's Principal, Richard Cox, and the Education Service Center in June of 1988 and Bewley was cleared. That investigatory file was never provided although it was requested.

In January of 1990 Bewley vocally refused to approve altered attendance records. As assistant principal he was required to certify the transmitted records which were the basis

of school funding. Not only did he instruct attendance office workers not to alter them when they had been told to do so by Education Service Center personnel, he told his principal, Richard Cox, and called the Service Center and told the Registrar, Jim Walker, "We're not changing any records here." Deposition of Gary Bewley of Jan. 7, 1992, p. 15, l. 15-16. Had he not been suspended on April 17, 1990, Bewley would have been required to certify those attendance records as correct, something he had sworn not to do.

An increase in reported attendance results in an increase in funding to the School District reporting greater attendance and a reduction in funding to others. It's criminal in Oklahoma to falsify attendance reports. Everyone involved can lose jobs, offices and licensure. That includes the School Board Superintendents and their attorneys.

Cathy Rodgers filed a tort claim in 1990, prior to Bewley's suspension. Cathy Rodgers has a lengthy psychiatric history and has accused many males of having sexual relations

with her. Subsequent to Bewley's pre-termination hearing, she received a settlement of undisclosed amount from insurers for the School Board for the alleged mistreatment by both Bewley and by Coach LeGrone, whom she said fathered her 9 lb. 2 oz. premature baby boy, who was subsequently "adopted". Rodgers' lawyer, Doris Fransein, is a friend and Tulsa lawyer colleague of Douglas Mann of the Rosenstein, Fist & Ringold Law Firm who represented the School Board. Douglas Mann met with the School Board in private sessions before Bewley's pre-termination hearing and presented the "straight evidence" to them so that the Board was hopelessly biased against Bewley before his hearing. These meetings, as conducted, were illegal in Oklahoma. State Open Meeting Act, Okl. Stat. tit. 25 § 301 et seq. (Laws 1971). At the pre-termination hearing itself, Douglas Mann acted as an advocate for Cathy Rodgers having prepared an exhibit, a layout of the school offices to aid her in presenting her testimony. Throughout the hearing Mann acted as if he were the attorney prosecuting the

criminal Bewley. Then he along with Doris Fransein, Cathy Rodgers and her mother, proceeded to go into deliberative sessions with the Board.

The only relevant evidence presented in support of Cathy Rodgers' allegation was her statement "It was there that he had penetrated me."

The entire hearing was televised and news accounts of the allegations were published in the Tulsa newspaper before and after the hearing. Cathy Rodgers' account about Bewley and LeGrone was published the day before the hearing. Board members noted in their depositions that they had been instructed not to read the paper just before the hearing because a story about Cathy Rodgers was going to be printed.

Depositions of Board members later revealed that all of them would have required Bewley to prove where he had been on May 3, 1988 during 6th hour in order to clear himself, rather than requiring Bewley's accusers to show by a

preponderance of the evidence that he had committed the act alleged.

Respondents, through principal, Richard Cox, locked up Petitioner's office records, had them boxed up and destroyed so that Bewley could not check his independent records to determine what he had been doing during 6th hour, on May 3, 1988. Bewley later discovered, through some papers left at his mother's house, witnesses to prove that he had been breaking up a girl fight involving a gun at that time. His request to depose the witnesses during the pendency of this appeal has been denied by Judge Brett. Except for the wrong-doing of Respondents, Bewley could have proved at his pre-termination hearing where he was on May 3, 1988, during sixth hour.

Petitioner Bewley has subsequently been unable to find employment as a teacher, counselor or assistant principal although he has tried diligently. He has been unable to find any but the most menial work due to the false and stigmatizing

information about him circulated as a result of his sham "due process" hearing.

In the District Court

Proceeding jurisdictionally under 28 U.S.C. § 1343(3) Petitioner timely filed, in the United States District Court for the Northern District of Oklahoma, a 42 U.S.C. § 1983 action alleging a conspiracy to violate his right to due process at the pre-termination hearing, including supplemental state law claims for retaliatory discharge in violation of his First Amendment right of Free Speech for vocally refusing to participate in the illegal alteration of attendance records. The court dismissed Cathy Rodgers and the slander claims against her without prejudice, granted qualified immunity as a matter of law to the Respondents, and granted summary judgment to Respondents on all claims.

In the Court of Appeals

Petitioner timely filed his appeal in the Tenth Circuit Court of Appeals pursuant to 28 U.S.C. § 1291. Oral argument requests were denied. Properly requested Motions to take judicial notice pursuant to FED. R. E. 201(D), of the laws of Oklahoma, including statutes making attendance record alteration illegal and Oklahoma Supreme Court cases recognizing a tort claim for retaliatory discharge in violation of public policy, including a right to jury trial on these claims, were ignored. The rulings of the District Court were affirmed. Petitioner timely files this Petition for Certiorari.

THE ARGUMENT FOR ALLOWANCE OF THE WRIT

1. **The Tenth Circuit Court of Appeals affirmed a decision deciding a question of federal law in a way that conflicts with applicable decisions of the United States Supreme Court which hold that the nonmovant on a motion for summary judgment need only present sufficient affirmative evidence of disputed material facts to entitle him to a jury trial.**

Petitioner presented affidavits, depositions, and a transcript of his pre-termination hearing in support of his objection to motion for summary judgment pursuant to FED. R. CIV. P. 56. These were based on personal knowledge, contained facts admissible at trial and showed that the affiants were competent to testify on the matters stated therein. It was the duty of the court to view the facts and inferences from the record in a light most favorable to Petitioner, to assume that he spoke the truth, and to determine if a reasonable jury could return a verdict for him.

Instead the District court and the Tenth Circuit Court of Appeals, ruling contrary to Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) denied Petitioner his right to a jury trial.

2. The Tenth Circuit Court of Appeals affirmed a decision on a matter of state law without taking properly requested mandatory judicial notice of state law pursuant to FED. R. EVID. 201 (D).

Petitioner presented a properly supported request to the Court of Appeals to take judicial notice of the Oklahoma

School Code making alteration of attendance records illegal and providing for termination of employment, removal from office and loss of licensure of Superintendents, principals, assistant principals, teachers, members of Boards of Education and their attorneys and all other involved in altering attendance records. These statutes express a public policy against terminating an employee for refusal to participate in the alteration of attendance records. These statutes were appended and are found herein at App. 3. Okl. Stat. tit. 70 § 22-110(B) (1971).

Petitioner also asked the Court of Appeals to take judicial notice of listed decisions of the Oklahoma Supreme Court recognizing his state law tort for retaliatory discharge and guaranteeing him a right to a jury trial. The Court of Appeals took no judicial notice. The Court of Appeals failed to take judicial notice, contrary to rulings of the United States Supreme Court in Bowen v. Johnston, 306 U.S. 19 (1938); Pure Oil Co. v. Minn., 248 U.S. 158, (1918); Berea College v.

Kentucky, 211 U.S. 45 (1908); Thomas v. Ohio State University, 195 U.S. 207 (1904).

3. **The Tenth Circuit Court of Appeals has decided a federal question, the right of Petitioner to a jury trial on his state law claims for deprivation of his First Amendment right of free speech, for his termination for vocally refusing to alter attendance records, in a way in conflict with the decisions of the Supreme Court of Oklahoma.**

Those decisions are: Hargrave v. Canadian Valley Elec. Coop., 792 P.2d 50 (Okl. 1990); Pearson v. Hope Lumber Co., Inc., 820 P.2d 443 (Okl. 1991; Burk v. K-Mart Corp. 770 P.2d 24 (Okl. 1989); Smith v. Farmers Cooperative Association of Butler, 825 P.2d 1323 (Okl. 1992); Hinson v. Cameron, 741 P.2d 549 (Okl. 1987); Thompson v. Medley Material Handling, Inc., 732 P.2d 461 (Okl. 1987).

4. **The Tenth Circuit Court of Appeals has decided an important question of federal law, whether Petitioner is entitled to confront witnesses in a jury trial or must have a trial by affidavits, in a way that conflicts with applicable decisions of the United States Supreme Court.**

The United States Supreme Court has recognized the fundamental rights sought to be preserved by the Seventh Amendment provision for jury trials in civil cases. Those rights are the right to confront, cross-examine and impeach adverse witnesses, so that a live jury can hear live witnesses. Adickes v. Kress & Co., 398 U.S. 144. (1970).

The case cited by Judge Brett is support of the granting of summary judgment to respondents on all issues is clearly distinguishable from Petitioner's case. In Bishop v. Wood, 426 U.S. 341 (1976), a case arising from the Fourth Circuit, there was no authoritative interpretation from the highest court in North Carolina interpreting an ordinance providing a pre-termination hearing for "permanent" employees. In that case officer Bishop was discharged without a hearing and the Court of Appeals found the construction of the city ordinance involved "tenable." That case turned on North Carolina law which gave Bishop no property interest in continued employment. The Supreme Court could not make an

independent examination of the state law issue. Further the false, damaging and stigmatizing reasons given for Bishop's discharge, on which he based his liberty interest claim, failed because those charges were not made public as they were in Petitioner Bewley's case.

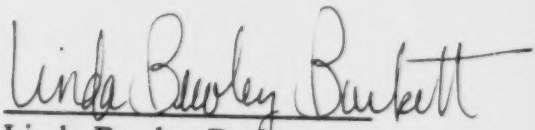
But Petitioner Bewley **had** a pre-termination hearing although it was fundamentally flawed and the tribunal hopelessly biased. Where Bishop v. Wood is pertinent is in demonstrating Bewley's ignored state law claims in Oklahoma where the Oklahoma Supreme Court **has** spoken on his right to a jury trial for retaliatory discharge in violation of public policy. Smith v. Farmer's Cooperative Association of Butler, 825 P.2d 1323 (Okl. 1992).

CONCLUSION

After more than three years of being unable to find employment in his profession or any comparable employment and of wrongfully bearing the false and humiliating stigma of

publicized sexual misconduct, Petitioner is still being denied a full and fair hearing of his case before an impartial jury. This is not a case of review of a routine personnel decision. This is a case where, if the United States Supreme Court does not grant Petitioner's Writ of Certiorari, justice will be defeated and Petitioner, Gary Bewley, forever denied his Constitutional rights.

Respectfully submitted,



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Certificate of Service

This is to certify that on this 12th of October, 1993, I placed in the U.S. Mails, first class postage fully prepaid thereon a true copy of th Petition for Certiorari and Appendix to:

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APPENDIX 1

Decision of Tenth Circuit Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

GARY BEWLEY,	)	
	)	
Plaintiff-Appellant,	)	
	)	No. 92-5215
v.	)	(D.C. No. 91-C-346-B)
	)	(N.D. Okla.)
BRUCE HOWELL, Superintendent; INDEPENDENT SCHOOL DISTRICT NO. 1 OF TULSA COUNTY, OKLAHOMA; BOARD OF EDUCATION OF INDEPENDENT SCHOOL DISTRICT NO. 1 OF TULSA COUNTY, OKLAHOMA; JIMMY REEDER; DOUG DODD; JIM PAYNE; VERNON HOBBS; JUDY MCINTYRE; WALTER HUSHBECK; CATHY RODGERS,	)	
Defendants-Appellees.		

ORDER AND JUDGMENT*

Before SEYMOUR and TACHA, Circuit Judges, and ROGERS,** Senior District Judge.

**Honorable Richard D. Rogers, United States District Judge for the District of Kansas, sitting by designation.

After examining the briefs and appellate record, this panel has determinedunanimously that oral argument would not materially assist the

* This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.

determination of this appeal. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

In June 1990, plaintiff-appellant Gary Bewley, after a public hearing, was terminated from his employment as an administrator with the Tulsa Public Schools based on the conclusion of defendant-appellee Tulsa Board of Education (Board) that Mr. Bewley had participated in an act of sexual intercourse with a student from Will Rogers High School. In response to his termination, Mr. Bewley brought suit in the United States District Court for the Northern District of Oklahoma under 42 U.S.C. § 1983, claiming that the termination hearing violated his constitutional right to due process, the Board's hearing was not impartial in that his termination was actually in retaliation for constitutionally protected whistle blowing activities, and he was a victim of age discrimination. Mr. Bewley also alleged various state law causes of action.

The district court granted summary judgment to defendants, concluding that the termination hearing provided Mr. Bewley with the required due process, Mr. Bewley had not shown his "whistle blowing" activities to have been a motivating factor in the Board's decision to terminate him, and Mr. Bewley had failed to make out a prima facie case of age discrimination. The court further found defendants to be entitled to qualified immunity and concluded that plaintiff also failed to demonstrate genuine issues of material fact on his state law claims.

On appeal, Mr. Bewley argues that the court erred in granting

defendants' motion for summary judgment on his § 1983 due process claim; his retaliatory discharge claim based upon his whistle blowing activities was valid; and "[d]efendants' entitlement to qualified immunity from suit is not a factual issue for summary judgment." Aplt. Br. at ii. After reviewing the record and the briefs of the parties, we conclude that the district court was correct in all particulars, and we affirm.

The district court appropriately granted summary judgment to defendants if "'there [was] no genuine issue as to any material fact and ... the moving party [was] entitled to a judgment as a matter of law." Committee for the First Amendment v. Campbell, 962 F.2d 1517, 1521 (lOth Cir. 1992) (quoting Fed. R. Civ. P. 56(c)). We review the district court's action de novo and apply the same standards in evaluating the summary judgment motion as did the district court. Id. Once a properly supported motion for summary judgment is advanced, the nonmovant must come forward with affirmative evidence establishing the presence of a genuine issue of material fact. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 257 (1986).

As an initial matter, we note that Mr. Bewley argues the Board's action deprived him of a liberty interest by stigmatizing him and curtailing his future employment opportunities, apparently contending that he was due some more elaborate proceeding. Aplt. Br. at 21-22. Mr. Bewley misunderstands the requirements of due process under these circumstances.

> The fundamental right of due process is the opportunity to be heard at a meaningful time in a meaningful

> manner. An opportunity for a hearing provides due process whenever a party is reasonably notified of the pendency of an action against him and afforded the opportunity to appear. . . .
>
> In order for a hearing to afford an individual due process, the hearing tribunal must be impartial. A tribunal is not impartial if it is biased with respect to the factual issues to be decided at the hearing. This Court has held that a substantial showing of personal bias is required to disqualify a hearing officer or tribunal in order to obtain a ruling that a hearing is unfair.

Corstvet v. Boger, 757 F.2d 223, 229 (10th Cir. 1985) (citations omitted). Because Mr. Bewley was reasonably notified of the allegations against him, had the opportunity to appear at the hearing and present his side of the case, and as we note below has failed to demonstrate any kind of personal bias on the part of the Board and its members, we conclude that he received all the process he was due in conjunction with the alleged infringement of his liberty interest.

Our review of the record reveals no evidence of any of the Board activities of which Mr. Bewley complains. There is no evidence that (1) the Board had prejudged his case either because of a "briefing session" allegedly conducted by the Board's attorneys or because of exposure to media coverage regarding it; (2) the Board deprived Mr. Bewley of any relevant document in its possession prior to the hearing which was properly requested by Mr. Bewley's attorney; (3) any relevant document was destroyed by defendants; or (4) the Board had been apprised of Mr. Bewley's alleged "whistle blowing" activities prior to the hearing.

Many of the documents Mr. Bewley contends would have aided his

defense came to light after the hearing when Mr. Bewley found them in boxes in his mother's garage. There was no evidence that these documents were in the Board's possession at the time of the hearing. Indeed, there was evidence that such documents would have been destroyed routinely after the end of the 1988 school year and so unavailable to the Board. Aplee. Supp. App. at 32-33. At the time of the hearing, neither party knew the documents existed.

Likewise, the psychological evaluations of the student involved in this matter were not in the possession of the Board at the time of the hearing. Mr. Bewley knew that the student had been seeing a counselor, and his attorney could have requested such documents from the student's attorney had she pursued the matter.[1]

With regard to any pre-exposure by Board members to the facts of this case, all Board members except Mr. Vernon Hobbs stated in their depositions that they first learned of the allegations against Mr. Bewley from the agenda which they received approximately three days before themeeting. Mr. Hobbs, however, testified that, at one of the regular bi-

[1] It is unclear how the other documents Mr. Bewley complains were denied him would have helped his cause. Mr. Bewley's lawyer contends that she orally requested a copy of a tort claim notice filed by the student involved, but never received it, and that the investigation file was not provided. Mr. Bewley, however, never complained to the Board that he had not received all of the documents he requested, nor did he object to going forward with the hearing as scheduled. Mr. Bewley had full latitude to question all of the participants in this matter, both before and during the hearing, and has not shown why he was prejudiced by any alleged failure to get documents.

weekly briefing sessions for the Board, the school district Superintendent made a presentation regarding the matter. Addendum to App. to Br. for Aplt. at 1354. Nonetheless, Mr. Bewley presented no evidence that he was prejudiced by this meeting. There was evidence in the record that the briefing meeting was open to the public, id. at 454, and, without a showing of actual bias by the Board's attorney, we will not presume injury to Mr. Bewley from this meeting. See Holley v. Seminole County School Dist., 755 F.2d 1492, 1497 (llth Cir. 1985).

Finally, Mr. Bewley attempts to argue in his reply brief that defendants are guilty of conspiring to deprive him of his rights. Mr. Bewley, however, made no conspiracy argument to the district court and offered no evidence to support such a theory. We will not consider the issue for the first time on appeal. See Walker v. Mather (In re Walker), 959 F.2d 894, 896 (l0th Cir. 1992). [2] The other points raised by Mr. Bewley on appeal, including the propriety of the district court's grant of qualified immunity to these defendants, are affirmed for substantially the reasons stated by that court.

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[2]While Mr. Bewley's complaint may have adequately raised the issue of conspiracy sufficient to withstand a motion to dismiss, see New Mexico ex rel. Candelaria v. City of Albuquerque, 768 F.2d 1207, 1209 (lOth Cir. 1985), his failure to present any evidence of conspiracy, circumstantial or otherwise, renders his claim appropriate for disposition by way of summary judgment.

The judgment of the United States District Court for the Northern District of Oklahoma is AFFIRMED.

Entered for the Court

Stephanie K. Seymour
Circuit Judge

APPENDIX 2

Decision of United States District Court for the Northern District of Oklahoma

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

GARY BEWLEY,	)	
	)	
Plaintiff,	)	
vs.	)	No. 91-C-346-B
	)	
BRUCE HOWELL, SUPERINTENDENT;	)	
INDEPENDENT SCHOOL DISTRICT	)	
No. 1 OF TULSA COUNTY, OKLAHOMA;	)	
BOARD OF EDUCATION OF INDEPENDENT	)	
SCHOOL DISTRICT NO. 1 OF TULSA	)	
COUNTY, OKLAHOMA; JAMES REEDER;	)	
DOUG DODD; JIM PAYNE; VERNON HOBBS;	)	
JUDY McINTYRE; WALTER HUSHBECK;	)	
individually and as members of the Board of	)	
Education of Independent School District No. 1	)	
of Tulsa County, Oklahoma; and CATHY	)	
RODGERS, an individual,	)	
	)	
Defendants.	)	

ORDER SUSTAINING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

This litigation arises from the alleged wrongful termination of Plaintiff, Gary Bewley ("Bewley"), on June 20, 1990, by the Board of Education of Independent School District No. 1 of Tulsa County, Oklahoma ("the Board"). Bewley's termination was based on a majority of the Board (5 to 1) finding that Bewley, an employee of the staff of Will Rogers High School, had engaged in sexual relations with a minor female student, Cathy Rodgers, in the bathroom adjoining Bewley's office on May 3, 1988.

Bewley alleges herein various United States constitutional violations and state causes of action. Specifically, Bewley asserts he was denied his

lawful property and liberty interest without due process of law in that his hearing was substantially prejudiced by the delay between May 1988 and June 1990. He further alleges there was not an impartial tribunal, certain potentially exculpatory documents were destroyed, documents which would have aided his defense were withheld and a timely witness and exhibit list was not produced. Bewley also seeks relief for a violation of his First Amendment constitutional right for whistle blowing and seeks relief for age discrimination. Further, Bewley seeks relief under state causes of action for violation of public policy by wrongful termination, breach of contract, and violation of the Open Meeting Act. He seeks in excess of $50,000 damages and other proper equitable relief. In response, the Defendants assert that Plaintiff was given fundamental procedural due process and specifically deny any federal and state violations urged by Plaintiff.

Before the Court for decision is Defendants' Motion for Summary Judgment Pursuant to Fed.R.Civ.P. 56, now at issue.

The Standard of Fed.R.Civ.P. 56
Motion for Summary Judgment

Summary judgment pursuant appropriate where "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); Anderson v. Liberty Lobby. Inc., 477 U.S. 242, 250 (1986); Windon Third Oil & Gas v. FDIC, 805 F.2d 342 (10th Cir. 1986). In Celotex, 477 U.S.

at 317 (1986), it is stated:

> "The plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial."

To survive a motion for summary judgment, nonmovant "must establish that there is a genuine issue of material facts..." Nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita v. Zenith, 475 U.S. 574, 585 (1986). The evidence and inferences therefrom must be viewed in a light most favorable to the nonmoving party. Conaway v. Smith, 853 F.2d 789, 792 n. 4 (10th Cir. 1988). Unless the Defendants can demonstrate their entitlement beyond a reasonable doubt, summary judgment must be denied. Norton v. Liddel, 620 F.2d 1375, 1381 (10th Cir. 1980).

A recent Tenth Circuit Court of Appeals decision in Committee for the First Amendment v. Campbell, 962 F.2d 1517 (10th Cir. 1992), concerning summary judgment states:

> "Summary judgment is appropriate if 'there is no genuine issue as to any material fact and... the moving party is entitled to a judgment as a matter of law.' ... Factual disputes about immaterial matters are irrelevant to a summary judgment determination... We view the evidence in a light most favorable to the nonmovant; however, it is not enough that the nonmovant's evidence be 'merely colorable' or anything short of 'significantly probative.'...
>
> "A movant is not required to provide evidence negating

an opponent's claim. . . . Rather, the burden is on the nonmovant, who 'must present affirmative evidence in order to defeat a properly supported motion for summary judgment.' . . . After the nonmovant has had a full opportunity to conduct discovery, this burden falls on the nonmovant even though the evidence probably is in possession of the movant. (citations omitted). *Id.* at 1521."

Uncontroverted Material Facts Revealed by the Record

Local Rule 15B in pertinent part states as follows:

"15B. Summary Judgment Motions. A brief in support of a motion for summary judgment (or partial summary judgment) shall begin with a section that contains a concise statement of material facts as to which movant contends no genuine issue exists. The facts shall be numbered and shall refer with particularity to those portions of the record upon which movant relies. The brief in opposition to a motion for summary judgment (or partial summary judgment) shall begin with a section which contains a concise statement of material facts as to which the party contends a genuine issue exists. Each fact in dispute shall be numbered, shall refer with particularity to those portions of the record upon which the opposing party relies, and, if applicable, shall state the number of the movant's fact that is disputed. All material facts set forth in the statement of the movant shall be deemed admitted for the purpose of summary judgment unless specifically controverted by the statement of the opposing party...."

Pursuant to Local Rule 15B in their brief in support of the motion for summary judgment, Defendants set out fifty-nine "undisputed material facts." In the Plaintiff's brief in opposition to the Defendants' motion for summary judgment, Plaintiff mentions thirteen of the school district Defendants' fifty-nine numbered undisputed facts. Thus, the fifty-nine

uncontroverted material facts set forth in the Defendants' brief are admitted with the exception of Undisputed Facts Nos. 4, 5, 6, 9, 10, 11, 25, 26, 33, 35, 41, 50, and 52.

The fifty-nine uncontroverted material facts set forth by the Defendants, which the Court finds are supported by the record, are as follows (The Court added a sentence to fact #25 and #35):

1. Before the beginning of the 1987-88 school year, Bewley was employed by the Tulsa School District as a social studies teacher at Will Rogers High School. (Deposition of Gary Bewley, Volume I, pp. 73, 85, attached as Exhibit A (hereafter referred to as Bewley I)).

2. As a tenured teacher, Bewley was evaluated annually by his principal. The evaluation form used by the principal was titled "Teacher's Confidential Evaluation," and Bewley signed the form in the space designated for "signature of teacher." (Bewley I, pp. 75-85; Exhibits A-1 and A-2.[1]

3. In the summer of 1987, Bewley was promoted to acting guidance dean at Will Rogers. (Bewley I, pp. 85-86).

4. During the 1987-88 school year, the regular school day at Will Rogers included hours one through six, and ran from 8:00 a.m. to 2:45 p.m. (Deposition of Richard Cox, p. 181, attached as Exhibit B (hereafter Cox)).

5. During the 1987-88 school year, Bewley was given an extra-duty assignment to teach the behind-the-wheel component of driver's education. (Cox, pp. 172-180; Exhibit B-1.) Bewley performed the assignment before

[1]The letter prefix indicates that these documents are deposition exhibits from Bewley I and Bewley II.

and after regular school hours, during zero hour and seventh hour. (Bewley I, p. 90; Cox, p. 181).

6. An extra-duty assignment is a duty assigned to an employee that is not included within that employee's regular assignment. In most cases, employees are paid additional compensation for extra-duty assignments. (Cox, p. 174).

7. Bewley was paid additional compensation of $8 per hour over and above his regular contract salary for each hour of behind the-wheel driver's education. (Bewley I, pp. 89-92).

8. Bewley doesn't know what assignments are or are not extra-duty assignments. (Bewley I, pp. 67-69).

9. In January of 1988, Bewley was promoted to the position of acting assistant principal at Will Rogers. (Bewley I, p. 92).

10. At the time Bewley was made acting assistant principal, the Tulsa School District was faced with a shortage of funds. As a result promotions were made without increasing compensation, and that fact was reflected by designating the position as "acting." When Bewley became acting assistant principal, he assumed all duties and responsibilities of an assistant principal. (Cox, pp. 49-150).

11. Bewley was formally evaluated by his principal as an administrator during the 1987-88 school year, and Bewley signed his evaluation as an administrator. (Bewley I, pp. 93-94; Exhibit A-3).

12. On May 31, 1988, Cathy Rodgers ("Cathy") reported to a

teacher at Will Rogers that Bewley had engaged in an act of sexual intercourse with her earlier that month. The teacher advised Cathy to report the incident to a counselor. Cathy then went to Jody Stinnett ("Stinnett"), a female counselor, and told her what had happened. (Transcript of Hearing before Board of Education held June 20, 1990,[2] pp. 42-43; (hereafter Hearing Transcript); Cox, pp. 41-42).

13. Cathy believed that the incident with Bewley had occurred on May 3. Cathy was seventeen years old and a junior at Will Rogers High School at the time. (Hearing Transcript, pp. 26-27, 31-32, 44).

14. Cathy told Stinnett that she had been tardy for her sixth hour class on the day in question and had asked Bewley to write her an excused pass. She had gone with Bewley to his office, which had a bathroom attached to it. She told Stinnett that Bewley had showed her a condom and that she and Bewley had engaged in sexual intercourse on a mat in the bathroom. (Deposition of Jodie Stinnett, pp. 27-30, attached as Exhibit C (hereafter Stinnett)).

15. After talking with Cathy, Stinnett went to Richard Cox ("Cox"), the principal of Will Rogers High School, and reported Cathy's account. Cox instructed Stinnett to take a written statement from Cathy and from the three girls who had come with Cathy when Cathy reported the incident. (Cox, pp. 41-42; Stinnett, pp. 30-34).

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[2]The entire transcript of this hearing is included as the second bound volume of the School District's exhibits.

16. Cox reviewed the girls' written statements and met with Bewley. Bewley denied that the incident had occurred. Bewley told Cox an Army recruiter had been in Bewley's office all day on May 3. (Cox, pp. 43-46).

17. Cox met with Sgt. Jimmy Joe Cady ("Sgt. Cady") of the Army National Guard that afternoon or the next day. Sgt. Cady told Cox that he had been at Will Rogers High School on May 3. Sgt. Cady brought his Mandex calendar (an appointment book), which had a vertical line from 9:00 a.m. through 3:15 p.m. for that date. Sgt. Cady told Cox he had left at 2:30 P.M. that day. Cox made a copy of the page from Sgt. Cady's Mandex. (Cox, pp. 48-50).

18. Cox told Bewley that because of Sgt. Cady's presence in Bewley's office on May 3, Cox believed Cathy's statement was untrue. (Cox, p. 51).

19. Cox also questioned Betty Arney and Trudy Lewis, who worked in the attendance office across the hall from Bewley's office. Neither had seen Cathy with Bewley that afternoon. Cathy had not requested a pass from either of them on May 3. (Cox, pp. 52-53, 60-62).

20. Cox also conferred with Peggy Wolfe ("Wolfe"), Cathy's sixth hour teacher. Wolfe told Cox that Cathy had reported to class near the end of sixth hour on May 3 and that Cathy had given her a pass. Wolfe did not keep the pass. (Cox, pp. 62-64; Hearing Transcript, pp. 153-155).

21. Because Sgt. Cady provided Bewley with an alibi witness, Cox

concluded that Bewley was innocent of the charge against him. Sgt. Cady's statement was the key to Cox's decision. (Cox, p. 100; Hearing Transcript, p. 118).

22. In October of 1988, Cathy's mother contacted Don Hoopert, the director of secondary education for the Tulsa School District, about the incident with Bewley. Cox and Stinnett then met with Cathy's mother, and Cox explained his decision. Cox sent a memorandum to Hoopert and Roy J. Lewis, assistant superintendent for instruction for the Tulsa School District, regarding his meeting with Cathy's mother. (Cox, pp. 101-103; 108-109).

23. Dr. Bruce Howell ("Dr. Howell") became superintendent of the Tulsa School District on February 3, 1990. (Deposition of Bruce Howell, p. 5, attached as Exhibit D (hereafter Howell)).

24. In the spring of 1990, Cathy filed a notice of tort claim against the Tulsa School District. (Hearing Transcript, pp. 234235, 239-241). Cathy's tort claim alleged that she had been seduced by Bewley in her junior year and by another teacher at Will Rogers, Craig LaGrone ("LaGrone") in her senior year. (Letter dated April 2, 1990, attached as Exhibit E).

25. Upon learning of Cathy's allegations against Bewley and LaGrone, Dr. Howell called Bewley and LaGrone to his office to obtain their sides of the story. (Hearing Transcript, pp. 240-241). Dr. Howell then suspended Bewley and LaGrone with full pay pending an investigation into the allegations against them. (*Id.* at 242; letter dated April 11, 1990,

attached as Exhibit A-4). LaGrone subsequently resigned from the Tulsa School District. (Hearing Transcript, pp. 53-54). Dr. Howell advised Bewley he could resign his position with a good recommendation or obtain a lawyer and contest the matter. (Hearing Transcript, pp. 279, 292).

26. Pursuant to the standard procedure in matters involving the possible dismissal of certified employees for improper sexual involvement with students, Dr. Howell and the administration of the Tulsa School District requested the law firm of Rosenstein, Fist & Ringold to investigate the allegations against Bewley and make a recommendation as to whether there was sufficient evidence to go forward with a dismissal. Rosenstein, Fist & Ringold conducted an investigation, gathered evidence and ultimately presented the administration's case against Bewley to the Board of Education at Bewley's pre-termination due process hearing. (Hearing Transcript, pp. 6-7, 246-247). Rosenstein, Fist & Ringold is the regular legal counsel to the Tulsa School District and has provided legal services to the Tulsa School District for many years.

27. By letter dated April 17, 1990, Dr. Howell advised Bewley that he would recommend Bewley's dismissal and that Bewley had the right hearing before the Board of Education of the Tulsa School District. (Letter dated April 17, 1990, attached as Exhibit A-5).

28. Linda Burkett ("Burkett"), an attorney from Oklahoma City, represented Bewley in connection with his dismissal from the Tulsa School District. Burkett is Bewley's sister. (Bewley I, pp. 103-104).

29. By letter dated April 16, 1990, Burkett requested a copy of Bewley's complete personnel file, a copy of all rules and regulations governing employment contracts, grievances or arbitration procedures, and a hearing on the decision to suspend Bewley. (Letter dated April 16, 1990, attached as Exhibit A-6). All these items were provided to Bewley's lawyer prior to Bewley's dismissal hearing. (Bewley I, pp. 104-106; letter dated April 17, 1990, attached as Exhibit A-7).

30. By letter dated April 20, 1990, Burkett again requested a due process hearing for Bewley. Burkett also requested the following:

a. [Bewley's] complete personnel file;
b. The exact dates of the alleged wrongful acts;
c. The exact places and times of the alleged wrongful acts;
d. The full names, addresses and telephone numbers of all of those having knowledge of any of the wrongful acts alleged;
e. All written statements of Mr. Bewley's accusers;
f. The expected testimony of all witnesses who have been contacted regarding the alleged wrongful acts;
g. Any and all exculpatory uncovered by his employer or agents of his employer;
h. All recorded evidence (photocopies, tape recordings, videotapes) in whatsoever form, in the possession or knowledge of his employer's agents. (Letter dated April 20, 1990, attached as Exhibit A-8).

31. On April 23, 1990, Dr. Howell advised Bewley by letter that Bewley's due process hearing would be held on May 17, 1990. He also advised Bewley of his right to be present in person at the hearing, his right to be represented by the attorney or counsel of his choice, his right to present any witnesses or evidence on his behalf, and his right to question witnesses

appearing on behalf of the administration. (Letter dated April 23, 1990, attached as Exhibit A-9).

32. By letter dated April 27, 1990, Burkett requested that Bewley's hearing be continued from May 17, 1990, because Sgt. Cady was not available on that date. (Letter dated April 27, 1990, attached as Exhibit A-10). The hearing was rescheduled for and ultimately held on June 20, 1990. Bewley and his attorney had two months to prepare for the hearing. (Bewley I, pp. 122-121).

33. By letter dated May 1, 1990, David Fist of Rosenstein, Fist & Ringold responded to Burkett's letter of April 20, 1990. Fist's letter was sent by certified mail, and Burkett signed the return receipt card acknowledging that she received it. (Letter dated May 1, 1990, attached as Exhibit A-11). Each of Burkett's eight specific requests was addressed in Fist's letter. (*Id.;* Bewley I, pp. 129-134).

34. Burkett interviewed members of the staff at Will Rogers in preparation for the hearing. (Hearing Transcript, pp. 105-106; Bewley I, pp. 234-238). In addition, Burkett requested, and was allowed, to interview Cox prior to Bewley's hearing. (Letter dated May 25, 1990, attached as Exhibit A-12).

35 The day before Bewley's hearing, Fist had a letter delivered to Burkett's office listing the administration's witnesses and providing a synopsis of their proposed testimony. (Letter dated June 19, 1990, attached as Exhibit A-13). Burkett reviewed the list before the hearing commenced.

36. The Tulsa Tribune published a lengthy article about Cathy's allegations against Bewley and LaGrone on June 19, 1990, the day before Bewley's hearing. All of the members of the Board were contacted by the Clerk of the Board of Education and instructed not to read the article. None of the members of the Board read the article. (Deposition of Judy Eason-McIntyre, pp. 64-65, attached as Exhibit F (hereafter, Eason-McIntyre); Deposition of Walter Hushbeck, pp. 95-96, attached as Exhibit G (hereafter Hushbeck); Deposition of Jim Payne, pp. 13-14, attached as Exhibit H (hereafter, Payne); Deposition of Doug Dodd, pp. 76-77, attached as Exhibit I (hereafter, Dodd); Deposition of Vernon Hobbs, pp. 33-34, attached as Exhibit J (hereafter Hobbs)).

37. The Board of Education of the Tulsa School District convened in open session at 8:00 a.m. on Wednesday, June 20, 1990. The agenda for the meeting specified the procedure that would be followed for Bewley's pre-termination hearing. (Agenda, dated June 18, 1990, attached as Exhibit A-14).

38. The attorneys for the administration and Bewley each made opening statements to the Board. (Hearing Transcript, pp. 5-17; Bewley I, pp. 170-171). The administration then presented its case against Bewley. The administration called five witnesses. (Hearing Transcript, pp. 2-3, 17-101, 112-174).

39. Cathy Rodgers testified that she had sexual intercourse with Bewley in the bathroom adjoining his office during sixth hour on May 3,

1988, between approximately 2:00 p.m. and 2:30 p.m. She drew a diagram of the office and bathroom and told the Board how the rooms were furnished. (Hearing Transcript, pp. 29-31). She testified that she and Bewley went to Bewley's office, and that Bewley locked the door to his office, took an unwrapped condom from a drawer, took her to the bathroom and told her to get undressed. Cathy testified that she undressed except for her shirt, that Bewley undressed, lay on top of her, penetrated her and ejaculated. She testified that the condom tore, that Bewley insisted that they shower together, and that Bewley gave her $5 to buy spermicide. Cathy testified that Bewley then wrote her a pass to allow her to get into her sixth hour class, and that she went to her sixth hour class when there were about ten minutes remaining in the hour. (Hearing Transcript, pp. 33-41; Bewley I, pp. 175-178).

40. Richard Cox testified as to his investigation of the incident in 1988. He told the Board that Sgt. Cady's alibi for Bewley was the key to his decision not to take the matter further. (Hearing Transcript, pp. 112-120).

41. Sgt. Cady testified that he had no recollection of May 3, 1988, and that all he could base his testimony on was his schedule as recorded in his Mandex. He testified that his Mandex showed that he was at Will Rogers recruiting on May 3, 1988. Sgt. Cady also testified that he had written the name "Orange" beside the 2:00 p.m. time slot in his Mandex, and the names "Ogden" and "McClellan" beside the 2:30 p.m. time slot in his Mandex. He explained that Orange, Ogden and McClellan were individuals who had to transfer into the Oklahoma National Guard from the Army Reserve, and

that he would not have met with them at Will Rogers. He testified that he knew he had met with them because they had transferred into the Oklahoma National Guard. Sgt. Cady testified that based on these facts, it was more probable than not that he left Will Rogers before 2:00 p.m. on May 3, 1988. (Hearing Transcript, pp. 129-152).

42. Margaret Wolfe testified that she was Cathy's sixth hour teacher in May of 1988. She told the Board that sixth hour lasted from 1:55 to 2:45 p.m. She testified that she recorded absences in her grade book, and that she had marked Cathy "absent" on May 3, 1988. She testified that she would not have changed the mark in her book to reflect that Cathy was present for the last ten minutes of class. (Hearing Transcript, pp. 153-158).

43. Jodie Stinnett testified that Cathy reported the incident with Bewley to her in the last week of May, 1988. She testified that she believed Cathy was telling the truth. (Hearing Transcript, pp. 158-174).

44. Bewley's attorney, Burkett, had the opportunity to cross-examine each of the witnesses called by the administration. (Hearing Transcript, pp. 49-101, 120-122, 140-148, 155-158, 163166; Bewley I, p. 174). The Board also had the opportunity to ask questions of each witness. (Hearing Transcript).

45. Bewley called twelve witnesses to testify before the Board. (Hearing Transcript; Bewley I, pp. 173-174).

46. One of Bewley's witnesses, Trudy Lewis, was working at Will Rogers on the day of the hearing. Bewley's attorney believed she was unavailable to testify. The Board instructed Cox to have her brought to the

hearing so she could testify for Bewley. (Hearing Transcript, pp. 66-71; 102-112).

47. Bewley also sought to introduce evidence concerning Cathy's relationship with Craig LaGrone and other teachers at Will Rogers. In her notice of tort claim, Cathy had asserted that she had become pregnant with LaGrone's child. J. Douglas Mann of Rosenstein, Fist & Ringold objected to the introduction of such evidence and urged the Board to focus solely on the allegations against Bewley. The Board overruled this objection and decided to hear all the evidence that Bewley wanted to present. (Hearing Transcript, pp. 52-63).

48. After Bewley had rested his defense, the administration called Cathy again as a rebuttal witness to testify as to comments written by various teachers in her "Autographs," a booklet students at Will Rogers could purchase and have their friends and teachers sign near the end of the school year. (Hearing Transcript, pp. 251-263. Comments written by teachers included "Mr. Bewley gets all the luck" and "You are a good student and Mr. Bewley's right arm." (Hearing Transcript, pp. 254-255; Board Exhibit 5 to Hearing Transcript).

49. Bewley then called three rebuttal witnesses, Wendell Wilkinson, Rita Bewley Lewis and Bewley himself. Only Wilkinson testified in rebuttal to Cathy's testimony regarding "Autographs." Mann argued that the testimony of Rita Bewley Lewis and Bewley was not proper rebuttal. The Board allowed Rita Bewley Lewis and Bewley to testify. (Hearing Transcript, pp. 269-334).

50. When he testified before the Board, Bewley had the opportunity to tell the Board everything he wanted to tell them. (Bewley I, pp. 162-163).

51. Bewley asserts that it was his practice to pull students who had been threatened with violence out of class and keep them in his office sixth hour. Bewley did not tell the Board about this practice. (Bewley I, pp. 196-199).

52. After Bewley was terminated, he found at his mother's house certain documents concerning students who were involved in fights the week of May 2, 1988. These documents purport to be statements written by students and are dated May 3, May 4 and May 5. (Exhibits A-15, A-16, A-17 and A-18, attached). These documents do not state that anyone was in Bewley's office sixth hour on May 3, 1988. (Bewley I, pp. 194-198). Bewley did not tell the Board about these documents during his hearing. (Bewley I, pp. 140-149).

53. Bewley did not tell the Board at his hearing that he believed he was being dismissed because of his age. (Bewley I, pp. 163-164).

54. Bewley did not tell the Board at his hearing that he believed he was being dismissed because he had uncovered a plot to falsify average daily attendance figures at Will Rogers. (Bewley II, pp. 40-42).

55. Bewley's hearing lasted approximately thirteen hours, from 9:00 a.m. until after 10:00 p.m. (Bewley I, p. 181). Bewley believes Burkett did her job in representing him at the board hearing. (Bewley I, pp. 174-175).

56. The Board deliberated in executive session from 7:48 p.m. until

10:17 p.m. before announcing its decision. (Hearing Transcript, p. 355). At the conclusion of the hearing the Board voted, 5-1, to adopt the following findings of fact:

> [O]n or about May 3rd, 1988, Gary W. Bewley participated in an act of sexual intercourse at Will Rogers High School with Cathy Rodgers who was then a student at Will Rogers High School under the age of 18. Mr. Bewley's conduct constitutes a proper basis for the termination of his employment from the Tulsa Public Schools.

The Board then voted, 5-1,[3] to terminate Bewley. (Hearing Transcript, pp. 355-357).

57. Bewley was an administrator on June 20, 1990. He was terminated from his job as an administrator. (Bewley I, p. 251).

58. Bewley was paid his salary and benefits through June 20, 1990. He was paid approximately $1,700 for accrued but unused sick leave. (Bewley I, p. 183).

59. Tom McGuire replaced Bewley as assistant principal at Will Rogers following Bewley's termination. Tom McGuire is older than Bewley. (Affidavit of Dr. Blaine Smith, attached as Exhibit K).

The Plaintiff, Bewley, lists 49 numbered paragraphs at pages 2-17 of his Brief in Opposition to Defendants' Motion for Summary Judgment. In order to determine if material disputed factual issues remain, the Court has made a thorough review of the record which includes a transcript of the thirteen-hour evidentiary hearing before the Board on June 20, 1990. A

[3]McIntyre, Hushbeck, Hobbs, Dodd and Reeder for termination; Payne against termination. (Transcript of Proceedings had on 6-20-90, p. 357).

review and analysis of the Plaintiff's asserted disputed material issues of fact follows: Plaintiff's facts in paragraphs 1, 2 and 3 are not in dispute.

Plaintiff's purported material undisputed facts 4 through 11 have some relevance only if Bewley is legally correct in asserting that in June 1990 when he was terminated he was entitled to the statutory termination procedures available to teachers and not administrators. Bewley argues his extra duty assignment as a driver education teacher in the 1987-88 school year qualified him as a teacher. However, Defendants' admitted fact No. 57 states:

> Bewley was an administrator on June 20, 1990. He was terminated from his job as an administrator. (Bewley I, p. 251).

The evidence establishes at the time of termination Bewley was an administrator and the hearing provided on June 20, 1990, comported with his administrator status. Okla.Stat. tit. 70, §6102.4 (1989 Supp.) (renumbered as 6-101.13).

Plaintiff's paragraph 12 does not controvert Defendants' uncontroverted material fact No. 41 which states Sgt. Jimmy Joe Cady ("Sgt. Cady") testified before the Board that his personal Mandex calendar reflected that he probably left Mr. Bewley's office on May 3, 1988, before 2 p.m. because he had appointments with three individuals at a location away from Will Rogers High School commencing at 2 p.m. on May 3, 1988.

Concerning Plaintiff's facts 13 and 14, there is a dispute whether such written statements of Cox and Sgt. Cady existed. In any event, Bewley, and witnesses Sgt. Cady and Cox each testified before the Board and the

Plaintiff was given reasonable latitude in cross examining Cox and Sgt. Cady concerning their involvement and overall testimony.

Plaintiff's fact in paragraph 15 concerns a handwritten statement of a student named Shaunielle McCoy. The McCoy statement is dated May 3, 1988, and does not specify a time period. The Shaunielle McCoy statement was not presented at the time of the hearing on June 20, 1990, because its existence was unknown to both the school Board and Bewley. A copy of the Shaunielle McCoy statement was found by Bewley in his mother's garage after the hearing among papers he had stored there before the hearing. Bewley states now that this statement refreshes his memory that McCoy was in his office during sixth hour on May 3, 1990 in the 2:30 p.m. time frame. At the time of the hearing Bewley testified he could not recall who specifically was in his office on May 3, 1988, during the sixth hour time frame. (Bewley, p. 298-301, Volume II, Defendants' Exhibits).

The Court has examined the Hearing Transcript, p. 299, and does not conclude, as asserted by Plaintiff, that Board member Ms. Eason-McIntyre cut off the Plaintiff in his explanation of his sixth hour "safe keeping" practice.

Plaintiff's fact 16 states that Plaintiff's exhibit No. 39 establishes that a student named Marc Fisher was in Mr. Bewley's office during sixth hour on May 3, 1988. (Plaintiff's brief states 1998). Exhibit 39, the suspension record, reflects that the disciplinary incident occurred during sixth hour on May 2, 1988, and the student, Marc O. Fisher, was suspended for five days from May 3 to May 9, 1988. Thus, Marc O. Fisher was not in

attendance at Will Rogers High School on May 3, 1988. Further, Exhibit 39 was another document that was in storage at the Plaintiff's mother's garage prior to the hearing but was not presented to the Board at the time of the hearing.

Plaintiff's factual paragraphs 17 and 18 indicate that the documentation referred to in Plaintiff's paragraphs 15 and 16 was stored by Bewley in his mother's garage and he did not learn of their availability until a considerable time after the June 20, 1990 hearing and his termination.

Plaintiff's factual paragraphs 19 through 23 provide Bewley's statement concerning his "whistle blowing" claim and being retaliated against in violation of his First Amendment rights. The record reveals that there was no significant law violation concerning Will Rogers High School's method and way of recording student attendance for funding purposes, although it was within the Plaintiff's right to speak up on the subject. However, a significant point in this regard is that none of Bewley's "whistle blowing" allegations ever came to the attention of the Board before the hearing or before Bewley's termination. No evidence was offered on this subject at the day long due process hearing. Thus, the Board's decision and action was not based upon such "whistle blowing" activity.

Plaintiff's paragraphs 24-26 are not specifically material to the issues presented. It is Plaintiff's effort to establish that Superintendent Howell personally knew of Cathy Rodgers' sexual intercourse charge against Bewley prior to April of 1990, when she filed her tort claim notice. The facts in the record do not reasonably permit a conclusion that Howell

was aware of Bewley's involvement in the incident prior to April of 1990 when the tort claim notice was filed. In any event, such facts are not material because it is undisputed that the Board of Education was never presented with any evidence of "whistle blowing" by Bewley.

Plaintiff's fact 28 is neither material nor correct because on April 11, 1990, Cathy Rodgers had not filed suit against Tulsa Public School system but had filed the notice of a tort claim in early April 1990 with the clerk of the Board for the Tulsa Public Schools in accordance with the provisions of Okla. Stat. tit. 51, §151 *et seq.*

The Plaintiff's facts in paragraphs 29-31 refer to Bewley's efforts to obtain documents that were not furnished at the time. The record reveals that previous to the due process hearing Plaintiff's counsel made written requests for various numerous specified and types of documents. The record indicates that the school board, through its counsel, provided all such documentation specifically requested that was in custody of the school Board in April, May and June, 1990, previous to the hearing. The record does not reveal that either Bewley or his counsel ever complained to the Board of Education of a denial of any documents nor did they object to going forward with the hearing on June 20, 1990, because of a failure to provide certain documentation.

Plaintiff's paragraph 32 does not differ materially from the Defendants' undisputed material fact 26.

Plaintiff's paragraphs 33-35 are not material in view of the fact the

record reflects the Board members considered the evidence offered at the due process hearing and exercised their own independent judgment in voting on Plaintiff's termination by a vote of five to one.

Concerning Plaintiff's factual paragraph 36, there is nothing in the record to support that the Tulsa Board of Education or school district failed to produce any documentation prior to the hearing that had been properly requested in writing by Plaintiff's counsel.

Plaintiff's paragraph 37 is a misstatement of the documents requested by her letter of April 20, 1990 (Exhibit A-8 to the school district's opening brief). The record reflects that any documents specifically requested by Plaintiff were furnished which were in the custody of the school Board.

Plaintiff's paragraph 38 is not material to the dispute because the subject matter of the memo was covered in the evidence before the Board.

Plaintiff's paragraphs 39 and 40 refer to the fact that Cathy Rodgers had sought psychiatric therapy while in high school and had seen a psychological counselor. Bewley testified before the Board at the due process hearing that Cathy Rodgers had talked to him about her problems and about seeing a psychological counselor. (Bewley, Tr. 281-283). Bewley's lawyer could have inquired of Cathy Rodgers' attorney about information concerning her psychological treatment.

The record reveals the school Board at the time of the hearing on June 20, 1990, was not in possession of any psychiatric or psychological reports concerning Cathy Rodgers. Bewley's lawyer did not pursue the subject until after the hearing and termination. The school board lawyer

states that had Bewley's counsel requested a copy of the Notice of Tort Claim in writing he would have readily furnished it because it is a public document. The record does not reveal any request was made by Plaintiff for the Notice of Tort Claim at the hearing of June 20, 1990.

Concerning Plaintiff's factual paragraphs 41-43 about removal of documents from Bewley's office, Exhibits L and M to the Defendants' opening brief are relevant excerpts from the depositions of custodians Jerry Bowman and Claude Long. There is no evidence in the record that material documentation was wrongfully or improperly removed from Bewley's office.

Plaintiff's paragraph 44 is not material because the Plaintiff could have attempted to contact the potential witnesses Orange, Odgen or McClellan, but did not do so.

Concerning Plaintiff's factual paragraph 45, there is no due process requirement of the furnishing of a witness list any specific time prior to the hearing. The school Board's attorney sent a witness and exhibit list by courier the day before the hearing to attorney Linda Burkett's office in Oklahoma City. She was already in Tulsa preparing for the hearing and apparently did not receive the list until just before the actual hearing. Same could have been communicated to her by telephone upon receive had her office chosen to do so. The witnesses called on behalf of the school Board were persons known and revealed to Plaintiff and his counsel during their investigation before the hearing.

Concerning Plaintiff's factual paragraph 46 the record reveals there was no law violation of any kind, state or federal, relative to Dr. Howell's purported private conversation in Paragraph 46. Such is not a material fact.

Plaintiff's fact No. 47 is not supported by the record because each school board member testified that he or she understood the burden of proof was on the school administration. Eason-McIntyre, pp. 68-69; Hushbeck, pp. 34-36; Payne, pp. 16-20; Dodd, pp. 74-75; Reeder, pp. 67-68; Hobbs, pp. 77-78.

Plaintiff's facts No. 48 and 49 are not material because the documents which Bewley claims to have sought were either not in the custody of the school Board or were available from other sources or from the Plaintiff's mother's garage where Plaintiff previously stored them. The documents were accessible from third-party sources but simply not obtained or requested by the Plaintiff.

Legal Authorities and Analysis

The gravamen of the matter centers in the procedural due process issue. The fundamental right of due process is the opportunity to be heard at a meaningful time and in a meaningful manner. Matthews v. Eldridge, 424 U.S. 319, 333, 96 S.Ct. 893, 901, 47 L.Ed.2d 18 (1976); Armstrong v. Manzo, 380 U.S. 545, 552, 85 S.Ct. 1187, 1191, 14 L.Ed.2d 62 (1965); Corstvet v. Boger, 757 F.2d 223 (1985); and Walker v. United States, 744 F.2d 67 (l0th Cir. 1984). Due process includes an impartial tribunal, notice of the charges and that the notice be given a reasonable time before the

hearing is to take place, and, except in emergency situations, the hearing be held before termination becomes effective. Walker v. United States, 744 F.2d 67, 70 (10th Cir. 1984).

Bewley's liberty interest claim is also premised on the contention that he was denied procedural due process. The Supreme Court noted in Baker v. McCollan, 443 U.S. 137, 99 S.Ct. 2689, 61 L.Ed.2d 433 (1979), "the Fourteenth Amendment does not protect against all deprivations of liberty. It protects only against deprivation of liberty accomplished 'without due process of law.'" *Id.* at 145, 99 S.Ct. at 2695, 61 L.Ed.2d at 442.

The truthfulness or falsity of Cathy Rodgers' testimony is not an issue before this court. It is stated in Bishop v. Wood, 426 U.S. 341, 48 L.Ed.2d 684 96 S.Ct. 2074 (1976):

> "The federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies. (footnote omitted). We must accept the harsh fact that numerous individual mistakes are inevitable in the day-to-day administration of our affairs. The United States Constitution cannot feasibly be construed to require federal judicial review for every such error. In the absence of any claim that the public employer was motivated by a desire to curtail or to penalize the protected rights, we must presume that official action was regular and, if erroneous, can best be corrected in other ways. The Due Process clause of the Fourtheenth Amendment is not a guarantee against incorrect or ill-advised personnel decisions."

It is not this Court's purview to judge the credibility of the witnesses in what each party has characterized as a "swearing contest." The credibility

of witnesses was for the school Board at the June 20, 1990, hearing.

Bewley asserts that re-opening the investigation twenty-three months following the incident violates due process. The undisputed facts reveal that the investigation was re-opened after the complainant, Cathy Rodgers, filed a notice of tort claim with the school district pursuant to Oklahoma law which alleged a pattern of -sexual abuse against her at Will Rogers High School. The new school superintendent, Dr. Howell, had the authority to direct the investigation concerning the charges to proceed. The record reflects that school principal Cox's initial conclusions in June 1988, favorable to Bewley, were based upon an erroneous interpretation of alibi information from Sgt. Cady.

Bewley's position that any reason to further investigate the matter or preserve evidence ceased with Mr. Cox's initial decision to not pursue the matter is somewhat disingenuous. In this day and time, the continuing potential for criminal or civil litigation from such charged conduct is very real, at least so long as there is not a legal bar by limitations.

The school Board was alerted to the Cathy Rodgers claim against Bewley for the first time when she filed her notice of tort claim with the clerk of the Board on April 2, 1990. A prompt investigation was directed by Superintendent Howell upon receipt of the notice of tort claim and then the full hearing proceeded on June 20, 1990, approximately two months later.

Bewley claims that he was denied access to certain documents,

some of them exculpatory. The record reveals that prior to the due process hearing Bewley's counsel was provided all documents requested in writing that were within the custody of the school district. Copies of some documents that had been discarded in the normal course of the school year had been placed in storage by Bewley in his mother's garage. Bewley had forgotten they existed at the time of the hearing on June 20, 1990. Once copies of these documents came to Bewley's attention after the hearing and termination, he did not petition the school Board for a rehearing or new trial. These documents have been previously discussed herein in the factual section of this order.

Plaintiff's assertion that the Board was biased is not supported by the record. Plaintiff's various arguments in this regard do not establish a factual issue. Mangels v. Pena, 789 F.2d 836, 838 (lOth Cir. 1986), and Evers v. Pender County Board of Education, 407 S.E.2d 879 (N.C.App. 1991). The law presumes the Board members act with honesty and integrity when discharging their official duties. Hortonville Joint School District No. 1 v. Hortonville Education Association, 426 U.S. 482, 497, 96 S.Ct. 2308, 2316, 49 L.Ed.2d 1, 11-12 (1976).

Bewley further argues that he was denied due process because the school Board's longtime regularly retained law firm presented the administration's case on behalf of the superintendent to the Board at the due process hearing. Bewley asserts the Board was predisposed to believe the administration's case. The law firm, Rosenstein, Fist & Ringold, served as

an advocate for the administration and did not meet with the Board while the Board deliberated or advise the Board in any improper manner. Bewley at pages 31 and 36 of his response brief acknowledged this was a "pure swearing match." Defendants' lawyer Mann so advised the Board at the commencement of the hearing in opening statement. (Tr. p. 12).

Numerous decisions have held that absent a showing of actual bias, a school district's attorney may play more than one role in a teacher termination proceeding. Withrow v. Larkin, 421 U.S. 35, 95 S.Ct. 1456, 43 L.Ed.2d 712 (1975); Holley v. Seminole County School District, 755 F.2d 1492 (llth Cir. 1985); Breitling v. Solenberger, 585 F.Supp. 289 (W.D. Va. 1984), *aff'd,* 749 F.2d 30 (4th Cir. 1984); and Cochran v. Board of Education of Mexico School District No. 59, 815 S.W.2d 55 (Mo.App. 1991).

The Board understood the burden of proof was on the administration. (Depo. Eason-McIntyre, pp. 68-69; Hushbeck, pp. 34-36; Payne, pp. 16-20; Dodd, pp. 74-75; Reeder, pp. 67-68; Hobbs, pp. 77-78).

Bewley asserts a First Amendment Claim contending that the allegations made by Cathy Rodgers were merely a pretext to allow the Board to terminate him. Bewley urges that the real reason for his termination was that he uncovered some wrongdoing on the part to the Tulsa School District to falsify average daily attendance figures which would increase school district funding. (Bewley II, pp. 23-25). Bewley was entitled to raise this concern in the winter of 1990, although it turned out there was probably

nothing improper about the complained of method of reporting. The case of Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274, 97 S.Ct. 568, 40 L.Ed.2d 471 (1977), sets forth a three-prong test to determine whether a public employee's First Amendment right to free speech has been infringed: (1) the public employee has the burden of establishing as a matter of law that his speech was protected; (2) the employee must demonstrate that the protected speech was a substantial or motivating factor in the action taken against him; and (3) the burden then shifts to the employer to show by a preponderance of the evidence[4] that the employer would have made the same decision even in the absence of protected speech. *Id.* at 284-287, 97 S.Ct. at 574-576, 50 L.Ed.2d at 481-484. The evidence is undisputed that Bewley did not communicate this allegation to the school Board previous to or during the hearing of June 20, 1990. There is no evidence in the record that the school Board had any knowledge of Bewley's prior "whistle blowing" concerning the average daily pupil attendance funding matter. Bewley bears the burden of showing that his speech was the motivating factor behind the Board's decision, and mere conjecture about the motive behind the official decision is not sufficient to carry the Plaintiff's burden. Prebble v. Brodrick, 535 F.2d 605 (10th Cir. 1976), and Setliff v. Memorial Hospital of Sheridan County, 850 F.2d 1384 (10th Cir. 1988). The record before the court clearly indicates

[4]The Ninth Circuit has suggested that Congress has changed this burden of proof to a "clear and convincing" standard. Rivera v. United States, 924 F.2d 948, 954 n. 7 (9th Cir. 1991). This Court does not reach that question.

the Board terminated Bewley based upon Cathy Rodgers' allegations against him. Other than Bewley's conjecture, there is no evidence suggesting a causal link between Bewley's First Amendment "whistle blowing" claim and the sexual intercourse investigation.

The Oklahoma legislature has spelled out the procedures concerning termination of a full-time administrator in Okla.Stat. tit. 70, S6-102-4 (1989 Supplement) (renumbered as 6-101.13). Undisputed fact No. 57, as well as the record before the Court, establishes that Bewley was an administrator on June 20, 1990, and on that date was terminated from his job as an administrator. Bewley's assertion that he is entitled to the Oklahoma statutory termination procedures available to tenured teachers because of his extra duty assignment in driver's education is without merit. Maupin v. Independent School District No. 26 of Ottawa County, Oklahoma, 632 P.2d 396 (Okl. 1981).

Bewley's breach of contract claim is also without merit. Bewley's termination was for cause pursuant to appropriate statutory procedures, including procedural due process. Other jurisdictions have upheld terminations of school employees in similar situations. Board of Directors of Fairfield Community School District v. Justmann, 476 N.W.2d 335 (Iowa 1991); Evers v. Pender County Board of Education, 407 S.E.2d 879 (N.C.App. 1991); and Fisher v. Independent School District No. 622, 357 N.W.2d 152 (Minn.App. 1984). Bewley has not established a *prima facie case* of age discrimination. MacDonald v. Eastern Wyoming Mental Health

Center, 941 F.2d 1115 (10th Cir. 1991), and Merrick v. Northern Natural Gas Co., Div. of Enron Corp., 911 F.2d 426 (10th Cir. 1990). After being terminated Bewley was replaced by an older assistant principal at Will Rogers High School. In his opposition brief to Defendant's Motion for Summary Judgment, Bewley presented no argument to controvert the school district defendants' evidence regarding age discrimination. This failure to respond is due either to the absence of evidence regarding age discrimination in the record or perhaps Bewley has abandoned his age discrimination claim.

Likewise, Bewley did not discuss in his opposition response brief the Defendants' violation of the Open Meeting Act at the June 20, 1990 due process hearing. The record does not support violations of Oklahoma's Open Meeting Act, Okla.Stat. tit. 25, § 301 *et seq.*

Finally, for the reasons stated above, the record indicates that the individual Board members and Superintendent Howell are entitled to qualified immunity. Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 72 L.Ed.2d 396, 410 (1982). Qualified immunity, unlike other defenses, "not only shields a defendant from liability, but is also intended to protect the defendant from the burdens associated with trial." Pueblo Neighborhood Health Centers, Inc. v. Losavio, 847 F.2d 642, 645 (10th Cir. 1988). To overcome the qualified immunity defense, a plaintiff "must do more than identify a clearly established legal test and then allege that the defendant has violated it." Hannula v. City of Lakewood, 907 F.2d 129, 131

(10th Cir. 1990). The plaintiff must demonstrate "a substantial correspondence between the conduct in question and prior law allegedly establishing that the defendant's actions were clearly prohibited." *Id.* In Anderson v. Creighton, 483 U.S. 635, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987), the Supreme Court pointed out that a general allegation plaintiff's due process rights have been violated relationship to the inquiry under Harlow of whether the specific action at issue was objectively legally reasonable at the time it was taken. The record before the Court demonstrates the procedural due process granted Plaintiff was objectively and legally reasonable, free of constitutional infirmity.

For the reasons stated herein, Defendants' Motion for Summary Judgment Pursuant to Fed.R.Civ.P. 56 is hereby SUSTAINED.

DATED this 4th day of September, 1992.

s/ Thomas R. Brett

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

APPENDIX 3

Oklahoma School Code (excerpts)
Okl. Stat. tit. 70 § 1-101 (1971) et. seq.
Oklahoma Open Meeting Act (excerpts)
Okl. Stat. tit. 25, § 301 (1977) et. seq.

§ 1-111. School day--Six hours--Exceptions

A school day for any group of pupils shall consist of not less than six (6) hours devoted to school activities, except that a school day for nursery, kindergarten, first grade and senior high school groups shall be defined by the State Board of Education. Not more than one (1) school day shall be counted for attendance purposes in any twenty-four-hour period. Pupils absent from school in which they are regularly enrolled may be considered as being in attendance if the reason for such absence is to participate in scheduled school activities under the direction and supervision of a regular member of the faculty. Laws 1971, c. 281, § 1-111, eff. July 2, 1971.

§ 1-111. School day--Six hours--Exceptions

A. A school day for any group of pupils shall consist of not less than six (6) hours devoted to school activities, except that a school day for nursery, kindergarten, first grade shall be otherwise defined by law or as defined by the State Board of

Education. Not more than one (1) school day shall be counted for attendance purposes in any twenty-four-hour period. Pupils absent from school in which they are regularly enrolled may be considered as being in attendance if the reason for such absence is to participate in scheduled school activities under the direction and supervision of a regular member of the faculty.

B. Beginning with the 1993-94 school year, the school day for kindergarten may consist of six (6) hours devoted to school activities.

Amended by Laws 1989, c. 335, § 5, eff. July 1, 1989; Laws 1989, 1st Ex. Sess., c. 2, § 32, emerg. eff. April 25, 1990.

SCHOOL CODE

§ 6-102.4 Full-time certified administrators-Dismissal or nonreemployment--Due process

Whenever the local board of education or the administration of a school district shall determine that the dismissal or nonreemployment of a full-time certified

administrator from his administrative position within the school district should be effected, the administrator shall be entitled to the following due process procedures:

1. A. statement shall be submitted to the administrator in writing prior to the dismissal or nonreemployment which states the proposed action, lists the reasons for effecting the action, and notifies the administrator of his right to a hearing before the local board of education prior to the action; and

2. A hearing before the local board of education shall be granted upon the request of such administrator prior to the dismissal or nonreemployment. A request for a hearing shall be submitted to the board of education within ten (10) days after receiving the written statement shall constitute a waiver of the right to a hearing. No decision of the local board of education concerning the dismissal or nonreemployment of a full-time certified administrator shall be effective until the administrator has been afforded due process as specified in this section. The decision of the local board of education

dismissal or nonreemployment, following the hearing shall be final.

Laws 1985, c. 234, § 1, eff. Nov. 1, 1985. Laws 1986, c. 290, § 1, eff. Nov. 1, 1986.

§ 6-102.6. Administrators--Suspension

Whenever the local board of education or the administration of a school district has reason to believe that cause exists for the dismissal of an administrator, and when they are of the opinion that the immediate suspension of an administrator would be in the best interests of the children in the district, the local board of education may suspend the administrator without notice or hearing. However, the suspension of the administrator shall not deprive the administrator of any compensation or other benefits to which he or she would otherwise be entitled under his or her contract or pursuant to law. Within ten (10) days' time after such suspension become effective, the local board of education shall

initiate proceedings pursuant to Section 6-102.4 of this title to have the administrator dismissed. However, in a case involving a criminal charge or indictment, such suspension may extend to such time as the administrator's case is finally adjudicated at a trial. Provided, however, such extension shall not include any appeal process..

Laws 1986, c. 290, § 2, eff. Nov. 1, 1986

§ 6-103.9. Rules of evidence--Proof

A. The rules of evidence set forth in Section 310 of Title 75 of the Oklahoma Statutes shall apply to all hearings authorized by this act. The standard of proof shall b by the preponderance of the evidence and the burden of proof at the hearing shall be on the district superintendent or his designee, as representative of the local board of education, to establish that the teacher's dismissal or nonreemployment is warranted.

B. The State Board of Education shall develop uniform standards and procedures to be used at such hearings; provided,

the hearings shall be governed in all respects by the provisions of the Oklahoma Administrative Procedures Act.

Laws 1977, c. 262, § 13, eff. June 17, 1977.

Sections 250 et seq. and 305 et seq. of title 75.

70 § 18-116. Forfeiture of State Aid

A. Any school district which wilfully operates school buses contrary to the rules and regulations prescribed by the State Board of Education shall forfeit its State Aid for the time of noncompliance. All State Aid funds shall be withheld from any school district that does not comply with the standards of the State Board of Education for accrediting.

B. 1. No more than fifty percent (50%) of the funds apportioned to school districts under the provisions of this article shall be paid by the state unless and until there has been filed with the State Board of Education on forms prescribed by such Board an itemized sworn account of the expenditures of

the school district during the next preceding fiscal year and a teacher personnel report for the current year.

2. All State Aid paid to a district whose district budget, as filed with the State Auditor and Inspector, shows that the appropriations of the district, plus the State Aid and other cash funds for which the district qualifies, will not enable it to maintain a full term of school as defined by this article, shall be credited against the State Aid of the district or districts to which the first district shall be annexed, if annexation is required. It is intended that the balance of any unexpended State Aid or other revenue originally allocated to an annexed district shall be paid to the receiving district.

C. School districts receiving State Aid shall not spend any of these funds except by regularly issued warrants. The warrants shall be issued against properly approved encumbrances in the manner provided by law. All encumbrances shall be approved by the board of education of the school district at a regular meeting or a special meeting called

for that purpose. All original copies of encumbrances as represented by purchase orders, shall be filed in numerical order, with the original paid invoice or invoices attached, accompanied by a signed and dated receiving copy verifying receipt of goods or services. It shall be unlawful to register or pay the warrant unless such warrant conforms to the statutes regulating the allowance and issuance thereof. Said treasurer shall purchase, by treasurer's check, all warrants issued.

D. All board of education members, employees or other officials of school districts required to make reports to the State Board of Education or other agencies under the provisions of this article, and all persons lawfully charged with the duty of making records of original entry, such as teachers' registers, transportation records, and financial records, which form the basis, in whole or in part, of said reports, shall exercise the highest degree of diligence, accuracy, and good faith in making said records and reports reflect the truth. Teachers' registers shall be marked daily in ink, by the teacher or principal in

charge of rooms or groups of pupils. Provided, the State Board of Education may authorize alternate systems of accounting for pupils' attendance in districts using data processing methods.

E. The State Board of Education shall revoke the certificate of any teacher, principal, or superintendent who knowingly or willfully violates any of the provisions of this article.

F. Any official involved in the execution of this article who shall fail or refuse to carry out any of the provisions thereof shall be liable on his official bond, if any, for the monetary damages resulting from said failure to act, and in addition thereto shall be subject to removal from office for neglect of duty under the provisions of law relating to the removal of public officials.

G. Any person or firm who shall knowingly or willfully violate any of the provisions of this article shall be guilty of a misdemeanor. Any public official or public employee violating any of the provisions of this article shall be subject to

the penalties for a misdemeanor and in addition thereto shall forfeit his position or office. Any officer or employee of the State Board of Education who knowingly or willfully apportions or disburses any monies appropriated by this article contrary to the provisions of this article shall be subject to the penalties for a misdemeanor and in addition shall forfeit his office or position.

H. The State Board of Education shall prescribe the form of all records, reports and applications for State Aid necessary to the proper administration of this article, and it shall be the duty of all county superintendents, school district superintendents, and boards of education of school districts to make such reports fully and completely at the time and in the manner prescribed by the State Board of Education. The State Board of Education shall also have authority and it shall be its duty to promulgate rules and regulations, not inconsistent with the provisions hereof, relative to the distribution of funds and for the administratif of this article. Such regulations and rules

shall apply alike to all school district. Laws 1971, c. 305, § 16, eff. June 17, 1971. Laws 1979, c. 30, § 50, eff. April 6, 1979; Laws 1988, c.90, § 23, operative July 1, 1988; Laws 1988, c. 330, § 14.

70 § 18-117 SCHOOL CODE

§ 18-117. State Aid--Apportionment

All apportionments of State Aid to school districts shall be made by the State Board of Education through its Director of Finance, who shall not knowingly make any apportionment or disbursement of State Aid funds which is not authorized by law. Any State Aid funds illegally disbursed by the Director of Fiance shall be returned to the State Treasurer by the school district receiving such funds, or legal action shall be instituted in the name of the state against such school district or on the bond of the Director of Finance.

Laws 1971, c. 305, § 18, eff. June 17, 1971. Laws 1980, c. 159, § 21, eff. April 2, 1980.

§ 18-118. Examiners--State Aid funds defined.

A. The State Board of Education is hereby authorized to appoint a Chief Examiner and Deputy Examiners. They shall audit the State Aid funds received by the school districts of the state and the use made thereof, and shall make such other audits as may be required by the State Board of Education. The school districts and officers and employees thereof shall be jointly and severally liable for any diversion of any funds received by any such district for the purpose for which the funds were apportioned to said district. If said audits should disclose that State Aid funds have been illegally apportioned to, or illegally disbursed or expended by, a school district or any of its officers or employees, the State Board of Education shall make demand that such funds so illegally apportioned, disbursed or expended be returned to the State Treasurer by such school district. If funds are not returned, the amount in excess of the State Aid funds that would be payable to such district for the succeeding fiscal year shall be withheld. The

State Board of Education shall cause suit to be instituted to recover for the state any monies illegally disbursed or expended, if not otherwise recovered as provided in this article.

B. Any Foundation Program Aid or Incentive Aid apportioned in accordance with the provisions of this article shall be considered State Aid funds and all persons responsible for the apportionment or expenditure of such funds shall be liable for the proper distribution and use of such funds as provided by law.

Laws 1971, c. 305, § 19, eff. June 17, 1971.

§ 18-119. Intention of dependent district to conduct twelve years of education--Notice to County Treasurer

If on or before July 15th of any year a dependent school district files a written notice with the county treasurer of the county in which it is located that it intends to conduct twelve (12) years of education during the school year commencing in the succeeding September, then it shall be the duty of such

county treasurer to include such school district and its students in average daily attendance during the preceding school year in the computation and allocation of revenue under 47 O.S. 1961, § 22.2(b), as amended, and Section 1004(d) of Article 10 of Section 2, Chapter 365, O.S. L. 1963, as amended (68 O.S.1970, § 1004(d)); provided, however, that if such school district shall fail, neglect or refuse to provide twelve (12) years of education during such year then such allocation shall lapse and said county treasurer shall reallocate such revenues to the school districts entitled by law to receive the same.

Laws 1971, c. 305, § 20, eff. June 17, 1971.

§ 18-124. Withholding certain expenditures from Foundation and Salary Incentive Aid

A. Any school district with an average daily attendance (ADA) of more than one thousand five hundred (1,500) students for the preceding year which, in school year 1986-87, expends for administrative services, less expenditures for legal

services, more than eight percent (8%) of the amount it expends for total expenditures, less expenditures for legal services, shall have the amount which exceeds the eight percent (8%) withheld from 1987-88 Foundation and Salary Incentive Aid.

B. Any school district with an average daily attendance (ADA) of more than one thousand five hundred (1,500) students for the preceding year which, in school year 1987-88 or any school year thereafter, expends for administrative services, less expenditures for legal services, more than six percent (6%) of the amount it expends for total expenditures, less expenditures for legal services, shall have the amount which exceeds the six percent (6%) withheld from the following year's Foundation and Salary Incentive Aid.

C. Any school district with an average daily attendance (ADA) of more than five hundred (500) student but not more than one thousand five hundred (1,500) for the preceding year which, in school year 1987-88 or any school year thereafter,

expends for administrative services, less expenditures for legal services, more than eight percent (8%) of the amount it expends for total expenditures, less expenditures for legal services, shall have the amount which exceeds the eight percent (8%) withheld from the following year's Foundation and Salary Incentive Aid.

D. Any school district with an average daily attendance (ADA) of five hundred (500) or fewer students for the preceding year which, in school year 1987-88 or any school year thereafter, expends for administrative services, less expenditures for legal services, more than ten percent (10%) of the amount it expends for total expenditures, less expenditures for legal services, shall have that amount which exceeds the ten percent (10%) withheld from the following year's Foundation and Salary Incentive Aid; provided for district having average daily attendance (ADA) of two hundred (200) or fewer students in the 1986-87 school year, the amount withheld in the 1988-89 school year for excess administrative expenditures in the 1987-

88 school year shall be the amount in excess of twelve percent (12%).

E. Funds withheld pursuant to the provisions of this section shall be distributed though the State Aid formula to the districts not so penalized.

Laws 1985, c. 329, § 26, eff. July 30, 1985. Laws 1987, c. 204, § 115, operative July 1, 1987.

§ 22-110. False statements in reports--False information--Penalty

A. In any case where an accountant or partnership of accountants has knowingly issued an audit report, required under the provisions of this article, containing any false or misleading statement, the State Board of Education shall report such violation in writing to the board of education of such public school and, in the case of certified public accountants or partnerships of certified public accountants, to the Oklahoma State Board of Certified Public Accountancy. The State Board

of Education shall revoke their rights to perform such audits in the future.

B. Any member of the governing body of the local board of education or any member, officer, employee or agency of any department, board or commission of the public school who knowingly and willfully furnishes to the auditor or to his employee any false or fraudulent information shall be deemed guilty of malfeasance, and, upon conviction, the court shall enter judgment that such person so convicted shall be removed from office or employment of said public school. It shall be the duty of the court rendering such judgment to cause immediate notice of such removal from office or employment to be give to the proper officer of the school district so that the vacancy thus caused may be filled.

Laws 1971, c. 281, § 22-110, eff. July 2, 1971.

§ 22-111. Duties of board of education--Removal of members

It shall be the duty of each local board of education to cause such audits to be made in accordance with this article. It shall be the further duty of said board to file a copy of said audit with the proper authorities set forth in this article. Such filings shall be not later than thirty (30) days after completion of the audit. Any court of competent jurisdiction shall have the power to remove members of such board from office for violation of this article.

Laws 1971, c. 281, § 22-111, eff. July 2, 1971.

§ 22-112. State Aid withheld for failure to comply with this article

All further payment of State Aid for each district shall be withheld until the provisions of this article have been fulfilled by said district.

Laws 1971, c. 281, § 22-112, eff. July 2, 1971.

§ 22-113. State Board of Education to prescribe accounting systems and procedures

All accounting systems and procedures used by the school districts of the State of Oklahoma shall conform with the accounting systems and procedures prescribed by the State board of Education.

Laws 1971, c. 281, § 22-113, eff. July 2, 1971.

THE OKLAHOMA OPEN MEETING ACT

§ 301. Citation

This act shall be known as the Oklahoma Open Meeting Act. Laws 1977, c. 214, § 1, eff. Oct. 1, 1977

Section 310 et seq. of this title.

§ 302. Public policy

It is the public policy of the State of Oklahoma to encourage and facilitate an informed citizenry's understanding of the governmental processes and governmental problems.

Laws 1977, c. 214, § 2, eff. Oct. 1, 1977.

§ 303. Times and places--Advance notice

All meetings of public bodies, as defined hereinafter, shall be held at specified times and places which are convenient to the public and shall be open to the public, except as hereinafter specifically provided. All meetings of such public bodies, except for executive sessions of the State Banking Board and Oklahoma Savings and Loan Board, shall be preceded by advance public notice specifying the time and place of each such meeting to be convened as well as the subject matter or matters to be considered at such meeting, as hereinafter provided.

Amended by Laws 1987, c. 61, § 19, emerg. eff. May 4, 1987.

§ 304. Definitions

As used in this act:

1. "Public body" means the governing bodies of all municipalities located within the State of Oklahoma, boards of county commissioners of the counties in the State of Oklahoma, boards of public and higher education in the State of Oklahoma and all boards, bureaus, commissions, agencies, trusteeships, authorities, councils committees, public trusts, task forces or study groups in the State of Oklahoma supported in whole or in part by public funds or entrusted with the expending of public funds, or administering public property, and shall include all committees or subcommittee of any public body. It shall not mean the state judiciary or the State Legislature or administrative staffs of public bodies, including, but not limited to, faculty meetings and athletic staff meetings of institutions of higher education when said staffs are not meeting with the public body, or entry-year assistance committees, as defined in Section 6-152 of Title 70 of the Oklahoma Statutes Furthermore, it shall not mean the multi-disciplinary team provided for in subsection B of Section 2 of this act or any school board

meeting for the sole purpose of considering recommendations of said multi-disciplinary team and deciding the placement of any child who is the subject of such recommendation.

2. "Meeting" means the conducting of business of a public body by a majority of its members being personally together.

3. "Regularly-scheduled meeting" means a meeting at which the regular business of the public body is conducted.

4. "Special meeting" means any meeting of a public body other than a regularly scheduled meeting or emergency meeting.

5. "Emergency meeting" means any meeting called for the purpose of dealing with an emergency. For purposes of this act, an emergency is defined as a situation involving injury to persons or injury and damage to public or personal property or immediate financial loss when the time requirements for public notice of a special meeting would make such procedure impractical and increase the likelihood of injury or damage or immediate financial loss.

6. "Continued or reconvened meeting" means a meeting which is assembled for the purpose of finishing business appearing on an agenda of a previous meeting. For the purposes of this act, only matters on the agenda of the previous meeting at which the announcement of the continuance is made may be discussed at a continued or reconvened meeting.

Amended by Laws 1988, c. 153, § 6, eff. July 1, 1988.

1 Section 301 et seq. of this title.

2 Section 1-502.2 of title 63.

§ 305. Recording of votes

In all meetings of public bodies, the vote of each member must be publicly cast and recorded.

Laws 1977, c. 214, § 5, eff. Oct. 1, 1977.

§ 306. Circumvention of act

No informal gatherings or any electronic or telephonic communications among a majority of the members of a public

body shall be used to decide any action or to take any vote on any matter.

Laws 1977, c. 214, § 6, eff. Oct. 1, 1977.

§ 307. Executive sessions

No public body shall hold executive sessions unless otherwise specifically provided for herein.

Executive sessions of public bodies will be permitted only for the purpose of discussing the employment, hiring, appointment, promotion, demotion, disciplining or resignation of any individual salaried public officer or employee, or for the purpose of confidential communications between a public body and its attorney concerning a pending investigation, claim, or action if the public body, with the advice of its attorney, determines that disclosure will seriously impair the ability of the public body to process the claim or conduct a pending investigation, litigation, or proceeding in the public interest; or by

district boards of education for the purpose of hearing evidence and discussing the expulsion or suspension of a student when requested by the student involved or his parent, attorney or legal guardian, for the purpose of discussing negotiations concerning employees and representatives of employee groups, and for the purpose of discussing the purchase or appraisal of real property. Provided, however, that any vote or action thereon must be taken in public meeting with the vote of each member publicly cast and recorded. An executive session held by a district board of education for the purpose of discussing the purchase or appraisal of real property shall be limited to members of said board, the attorney for the board, and the immediate staff of the board; no landowner, real estate salesperson, broker, developer, or any other person who may profit directly or indirectly by a proposed transaction concerning real property which is under consideration by the board of education may be present or participate in the executive session.

The State Banking Board may hold executive sessions to exercise those powers provided for under Section 306.1 of Title 6 of the Oklahoma Statutes. The Oklahoma Health Research Committee may hold executive sessions to confer on matters pertaining to research and development of products, if public disclosure of the matter discussed would interfere with development of patents, copyrights, products, or services. No executive session by a public body shall occur except on a vote by a majority of a quorum of the members present. Laws 1977, c. 214, P 7, eff. Oct. 1, 1977. Laws 1985,c. 168, § 9, eff. June 18, 1985; Laws 1985, c. 218, § 1, eff. Nov. 1, 1985; Laws 1986, c. 264, § 12, operative July 1, 1986.

DEFINITIONS AND GENERAL PROVISIONS

§ 307. Executive sessions

A. No public body shall hold executive sessions unless otherwise specifically provided in this section.

B. Executive sessions of public bodies will be permitted only for the purpose of:

1. discussing the employment, hiring, appointment, promotion, demotion, disciplining or resignation of any individual salaried public officer or employee;

2. discussing negotiations concerning employees and representatives of employee groups;

3. discussing the purchase or appraisal of real property,

4. confidential communications between a public body and its attorney concerning a pending investigation, claim, or action if the public body, with the advice of its body to process the claim or conduct a pending investigation, litigation, or proceeding in the public interest;

5. permitting district boards of education to hear evidence and discuss the expulsion or suspension of a student when requested by the student involved or his parent, attorney or legal guardian;

6. discussing matters involving a specific handicapped child; or

7. discussing any matter where disclosure of information would violate confidentiality requirements of state or federal law.

C. Notwithstanding the provisions of subsection B of this section, the following public bodies may hold executive sessions;

1. the State Banking Board, as provided for under Section 306.1 of Title 6 of the Oklahoma Statutes;

2. the Oklahoma Industrial Finance Authority, as provided for in Section 854 of Title 74 of the Oklahoma Statutes;

3. the Oklahoma Development Finance Authority, as provided for in Section 5062.6 of Title 74 of the Oklahoma Statutes;

4. the Oklahoma Center for the Advancement of Science and Technology, as provided for in Section 5060.7 of Title 745 of the Oklahoma Statutes;

5. the Oklahoma Savings and Loan Board, as provided for under subsection A of Section 381.74 of Title 18 of the Oklahoma Statutes; and

6. the Oklahoma Health Research Committee for purposes of conferring on matters pertaining to research and development of products, if public disclosure of the matter discussed would interfere with the development of patents, copyrights, products, or services.

D. An executive session for the purpose of discussing the purchase or appraisal of real property shall be limited to members of the public body, the attorney for the public body, and the immediate staff of the public body. No landowner, real estate salesperson, broker, developer, or any other person who may profit directly or indirectly by a proposed transaction concerning real property which is under consideration may be present or participate in the executive session.

E. No public body may go into an executive session unless the following procedures are strictly complied with:

1. the proposed executive session is noted on the agenda as provided in Section 311 of this title;

2. the executive session is authorized by a majority vote of a quorum of the members present and the vote is a recorded vote; and

3. except for matters considered in executive sessions of the State Banking Board and the Oklahoma Savings and Loan Board, and which are required by state or federal law to be confidential, any vote or action on any item of business considered in an executive session shall be taken in public meeting with the vote of each member publicly cast and recorded.

F. A willful violation of the provisions of this section shall:

1. subject each member of the public body to criminal sanctions as provided in Section 314 of this title; and

2. cause the minutes and all other records of the executive session, including tape recordings, to be immediately made public.

Amended by Laws 1987, c. 61, § 20, emerg. eff. May 4, 1987; Laws 1987, c. 222, § 115, operative July 1, 1987; Laws 1988, c. 153, § 7, eff. July 1, 1988; Laws 1989, c. 7, § 1, emerg. eff. March 27, 1989; Laws 1989, c. 200, § 1, emerg. eff. May 8, 1989; Laws 1992, c. 12, § 1, eff. Sept. 1, 1992.

Historical and Statutory Notes

Section 3 of Laws 1992, c. 12, provides for an effective date.

§ 310. Legislative committee members attending executive sessions

Any member of the Legislature appointed as a member of a committee of either house of the Legislature or joint committee thereof shall be permitted to attend any executive session authorized by the Oklahoma Open Meeting Act of any state agency, board or commission whenever the jurisdiction of such committee includes the actions of the public body involved.

Laws 1977, c. 214 § 10, eff. Oct. 1, 1977. Laws 1981, c. 272, § 7, eff. July 1, 1981.

Section 301 et seq. of this title

§ 311. Public bodies-Notice

Notwithstanding any other provisions of law, all regularly-scheduled, continued or reconvened, special or emergency meetings of public bodies shall be preceded by public notice as follows:

1. All public bodies shall give notice in writing by December 15 of each calendar year of the schedule showing the date, time and place of the regularly scheduled meetings of such public bodies for the following calendar year.

2. All state public bodies, including, but not limited to, public trusts and other bodies with the state as beneficiary, shall give such notice to the Secretary of State.

3. All county public bodies, including, but not limited to, public trusts and any other bodies with the county as

beneficiary, shall give such notice to the county clerk of the county wherein they are principally located.

4. All municipal public bodies, including, but not limited to, public trusts and any other bodies with the municipality as beneficiary, shall give such notice to the municipal clerk of the municipality wherein they are principally located.

5. All multi-county, regional, areawide or district public bodies, including, but not limited to, district boards of education, shall give such notice to the county clerk of the county wherein they are principally located, or if no office exists, to the county clerk of the county or counties served by such public body.

6. All governing boards of state institutions of higher education, and committees and subcommittees thereof, shall give such notice to the Secretary of State. All other public bodies covered by the provisions of this act which exist under the auspices of a state institution of higher education, but a majority of whose members are not members of the institution's

governing board, shall give such notice to the county clerk of the county wherein the institution is principally located.

7. The Secretary of State and each county clerk or municipal clerk shall keep a record of all notices received in a register open to the public for inspection during regular office hours, and, in addition, shall make known upon any request of any person the contents of said register.

8. If any change is to be made of the date, time or place of regularly-scheduled meetings of public bodies, then notice in writing shall be given to the Secretary of State or county clerk or municipal clerk, as required herein, not less than ten (10) days prior to the implementation of any such change.

9. In addition to the advance public notice in writing required to be filed for regularly-scheduled meetings, all public bodies shall, at least twenty-four (24) hours prior to such meetings, display public notice of said meeting, setting forth thereon the date, time, place and agenda for said meeting, such twenty-four (24) hours prior public posting shall exclude

Saturdays and Sundays and holidays legally declared by the State of Oklahoma; provided, however, the posting of an agenda shall not preclude a public body from considering at its regularly-scheduled meeting any new business. Such public notice shall be posted in prominent public view at the principal office of the public body or at the location of said meeting if no office exists. "New business", as used herein, shall mean any matter not known about or which could not have been reasonably foreseen prior to the time of posting.

10. In the event any meeting is to be continued or reconvened, public notice of such action, including date, time and place of the continued meeting, shall be given by announcement at the original meeting. Only matters appearing on the agenda of the meeting which is continued may be discussed at the continued or reconvened meeting.

11. Special meetings of public bodies shall not be held without public notice being given at least forty-eight (48) hours prior to said meetings. Such public notice of date, time and

place shall be given in writing, in person or by telephonic means to the Secretary of State or to the county clerk or to the municipal clerk by public bodies in the manner set forth in paragraphs 2, 3, 4, 5 and 6 of this section. In addition, all public bodies shall, at least twenty-four (24) hours prior to such special meetings, display public notice of said meeting, setting forth thereon the date, time, place and agenda for said meeting. Only matters appearing on the posted agenda may be considered at said special meeting. Such public notice shall be posted in prominent public view at the principal office of the public body or at the location of said meeting if no office exists. Twenty-four (24) hours prior public posting shall exclude Saturdays and Sundays and holidays legally declared by the State of Oklahoma.

12. In the event of an emergency, an emergency meeting of a public body may be held without the public notice heretofore required. Should an emergency meeting of a public body be necessary, the person calling such a meeting shall give as much

advance public notice as is reasonable and possible under the circumstances existing, in person or by telephonic or electronic means.

Laws 1977, c. 214, § 11, eff. Oct. 1, 1977.

Section 301 et seq of this title.

§ 311. Public bodies-Notice

A. Notwithstanding any other provisions of law, all regularly- scheduled, continued or reconvened, special or emergency meetings of public bodies shall be preceded by public notice as follows:

1. All public bodies shall give notice in writing by December 15 of each calendar year of the schedule showing the date, time and place of the regularly scheduled meetings of such public bodies for the following calendar year.

2. All state public bodies, including, but not limited to, public trusts and other bodies with the state as beneficiary, shall give such notice to the Secretary of State.

3. All county public bodies, including, but not limited to, public trusts and any other bodies with the county as beneficiary, shall give such notice to the county clerk of the county wherein they are principally located.

4. All municipal public bodies, including, but not limited to, public trusts and any other bodies with the municipality as beneficiary, shall give such notice to the municipal clerk of the municipality wherein they are principally located.

5. All multi-county, regional, areawide or district public bodies, including, but not limited to, district boards of education, shall give such notice to the county clerk of the county wherein they are principally located, or if no office exists, to the county clerk of the county or counties served by such public body.

6. All governing boards of state institutions of higher education, and committees and subcommittees thereof, shall give such notice to the Secretary of State. All other public bodies covered by the provisions of this act which exist under

the auspices of a state institution of higher education, but a majority of whose members are not members of the institution's governing board, shall give such notice to the county clerk of the county wherein the institution is principally located.

7. The Secretary of State and each county clerk or municipal clerk shall keep a record of all notices received in a register open to the public for inspection during regular office hours, and, in addition, shall make known upon any request of any person the contents of said register.

8. If any change is to be made of the date, time or place of regularly-scheduled meetings of public bodies, then notice in writing shall be given to the Secretary of State or county clerk or municipal clerk, as required herein, not less than ten (10) days prior to the implementation of any such change.

9. In addition to the advance public notice in writing required to be filed for regularly-scheduled meetings, all public bodies shall, at least twenty-four (24) hours prior to such meetings, display public notice of said meeting, setting forth

thereon the date, time, place and agenda for said meeting, such twenty-four (24) hours prior public posting shall exclude Saturdays and Sundays and holidays legally declared by the State of Oklahoma; provided, however, the posting of an agenda shall not preclude a public body from considering at its regularly-scheduled meeting any new business. Such public notice shall be posted in prominent public view at the principal office of the public body or at the location of said meeting if no office exists. "New business", as used herein, shall mean any matter not known about or which could not have been reasonably foreseen prior to the time of posting.

10. In the event any meeting is to be continued or reconvened, public notice of such action, including date, time and place of the continued meeting, shall be given by announcement at the original meeting. Only matters appearing on the agenda of the meeting which is continued may be discussed at the continued or reconvened meeting.

11. Special meetings of public bodies shall not be held without public notice being given at least forty-eight (48) hours prior to said meetings. Such public notice of date, time and place shall be given in writing, in person or by telephonic means to the Secretary of State or to the county clerk or to the municipal clerk by public

bodies in the manner set forth in paragraphs 2, 3, 4, 5 and 6 of this section. The public body also shall cause written notice of the date, time and place of the meeting to be mailed or delivered to each person, newspaper, wire service, radio station, and television station that has filed a written request for notice of meetings of the public body with the clerk or secretary of the public body or with some other person designated by the public body. Such written notice shall be mailed or delivered at least forty-eight (48) hours prior to the special meeting. The public body may charge a fee of up to Eighteen Dollars ($18.00) per year to persons or entities filing a written request for notice of meetings, and may require such persons or entities

to renew the request for notice annually. In addition, all public bodies shall, at least twenty-four (24) hours prior to such special meetings, display public notice of said meeting, setting forth thereon the date, time, place and agenda for said meeting. Only matters appearing on the posted agenda may be considered at said special meeting. Such public notice shall be posted in prominent public view at the principal office of the public body or at the location of said meeting if no office exists. Twenty-four (24) hours prior public posting shall exclude Saturdays and Sundays and holidays legally declared by the State of Oklahoma.

12. In the event of an emergency, an emergency meeting of a public body may be held without the public notice heretofore required. Should an emergency meeting of a public body be necessary, the person calling such a meeting shall give as much advance public notice as is reasonable and possible under the circumstances existing, in person or by telephonic or electronic means.

B. 1. All agendas required pursuant to the provisions of this section shall identify all items of business to be transacted by a public body at a meeting, including, but not limited to, any proposed executive session for the purpose of engaging in deliberations or rendering a final or intermediate decision in an individual proceeding prescribed by the Administrative Procedures Act.

2. If a public body proposes to conduct an executive session, the agenda shall:

a. contain sufficient information for the public to ascertain that an executive session will be proposed;

b. identify the items of business and purposes of the executive session; and

c. state specifically the provision of Section 307 of this title authorizing the executive session.

Amended by Laws 1987, c. 184, § 1, eff. Nov. 1, 1987. Laws 1992, c. 12, § 2, eff. Sept. 1, 1992.

Section 301 et seq of this title.

Sections 250 et seq. and 301 et seq of this title.

§ 312. Minutes of meetings

The proceedings of a public body shall be kept by a person so designated by such public body in the form of written minutes which shall be an official summary of the proceedings showing clearly those members present and absent, all matters considered by the public body, and all actions taken by such public body. The minutes of each meeting shall be open to public inspection and shall reflect the manner and time of notice required by this act.

In the written minutes of an emergency meeting, the nature of the emergency and the proceedings occurring at such meeting, including reasons for declaring such emergency meeting, shall be included.

Laws 1977, c. 214, § 12, eff. Oct. 1, 1977.

Section 301 et seq. of this title.

§ 313. Actions taken in willful violation of act

Any action taken in willful violation of this act shall be invalid.

Laws 1977, c. 214, § 13, eff. Oct. 1, 1977.

Section 301 et seq. of this title.

§ 314. Violations--Misdemeanor--Penalty

Any person or persons willfully violating any of the provisions of this act shall be guilty of a misdemeanor and upon conviction shall be punished by a fine not exceeding Five Hundred Dollars ($500.00) or by imprisonment in the county jail for a period not exceeding one (1) year or by both such fine and imprisonment.

Laws 1977, c. 214 § 14, eff. Oct. 1, 1977.

Section 301 et seq of this title.

APPENDIX 4

U.S. CONST., amend. I
U.S. CONST., amend. V
U.S. CONST., amend. VII
U.S. CONST., amend. XIV

U.S. CONST. amend. I

Religious and political freedom.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition the Government for a redress of grievances.

U.S. CONST. amend V

Criminal actions--Provisions concerning--Due process of law and just compensation clauses.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb,

nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

U.S. CONST. amend. VII

Trial by jury in civil cases.

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be other-wise re-examined in any Court of the United States, than according to the rules of the common law.

U.S. CONST. amend. XIV

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State

shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of

any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

APPENDIX 5

42 U.S.C. § 1983 (1979)

42 USCS § 1983 Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suite in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

(R. S. § 1979; Dec. 29, 1979, P. L. 96-170, § 1, 93 Stat. 1284.)

APPENDIX 6

FED. R. EVID. 201 (D)
FED. R. APP. P. 4(a)(1)
FED. R. CIV. P. 56

FEDERAL RULES OF EVIDENCE

ARTICLE II. JUDICIAL NOTICE

RULE 201

Rule 201. Judicial Notice of Adjudicative Facts

(a) Scope of rule. -- This rule governs only judicial notice of adjudicative facts.

(b) Kinds of facts. -- A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonable be questioned.

(c) When discretionary. -- A court may take judicial notice, whether requested or not.

(d) When mandatory. -- A court shall take judicial notice if requested by a party and supplied with the necessary information.

(3) Opportunity to be heard. -- A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of he matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.

(f) Time of taking notice. -- Judicial notice may be taken at any stage of the proceeding.

FED. R. APP. P. 4(A)(1)

RULES OF APPELATE PROCEDURE

Rule 4. Appeal as of Right--When Taken

(a) Appeals in Civil Cases. (1) In a civil case in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from; but if the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days

after such entry. If a notice of appeal is mistakenly filed in the court of appeals, the clerk of the court of appeals shall note thereon the date on which it was received and transmit it to the clerk of the district court and it shall be deemed filed in the district court on the date os noted.

(Amended Apr. 30, 1979, effective Aug. 1, 1979)

FED. R. CIV. P. 56

Rule 56. Summary Judgment

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory

judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof. (c), (d) [Unchanged].

(c), (d) [Unchanged.]

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise

provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.]

(f) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's

fees, and any offending party or attorney may be adjudged guilty of contempt.

(Amended March 19, 1948; July 1, 1963; Aug. 1, 1987.)

APPENDIX 7

28 U.S.C. § 1254(1)
28 U.S.C. § 1291
28 U.S.C. § 1343(3)
28 U.S.C. § 1367
Sup. Ct. R. 13

28. U.S.C. § 1254(1) Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

(June 25, 1948, ch 646, §1, 62 Stat. 928; June 27, 1988, P. L. 100-352, §2(a), (b), 102 Stat. 662.)

28. U.S.C. § 1291

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title [28 USCS §§ 1292(c), (d), 1295].

(June 25, 1948, ch 646, § 1, 62 Stat. 929; Oct. 31, 1951, ch 655, § 48, 65 Stat. 726; July 7, 1958, P. L. 85-508 § 12(e), 72 Stat. 348; Apr. 2, 1982, P. L. 97-164, Title I, Part A, § 124, 96 Stat. 36.)

28 U.S.C. § 1343

§ 1343. Civil rights and elective franchise

(a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42 [42 USCS § 1985];

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

(b) For purposes of this section--

(1) the District of Columbia shall be considered to be a State; and

(2) any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

(June 25, 1948, ch 646, § 1, 62 Stat. 932; Sept. 3, 1954, ch 1263, § 42, 68 Stat. 1241; Sept. 9, 1957, P. L. 85-315, Part III, § 121, 71 Stat. 637; Dec. 29, 1979, P. L. 96-170, § 2, 93 Stat. 1284.)

28 U.S.C § 1367

§ 1367. Supplemental jurisdiction

(a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil

action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

(b) In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising supplemental jurisdiction over such claims would be

inconsistent with the jurisdictional requirements of section 1332.

(c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if--

(1) the claim raises a novel or complex issue of State law,

(2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,

(3) the district court has dismissed all claims over which it has original jurisdiction, or

(4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

(d) The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it

is dismissed unless State law provides for a longer tolling period.

(e) As used in this section, the term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

(Added Dec. 1, 1990, P. L. 101-650, Title III, § 310(a), 104 Stat. 5113.)

Rule 13.1 Review on Certiorari; Time for Petitioning

.1. A petition for a writ of certiorari to review a judgment in any case civil or criminal, entered by a state court of last resort, a United States court of appeals, or the United States Court of Military appeals shall be deemed in time when it is filed with the Clerk of this Court within 90 days after the entry of the judgment. A petition for a writ of certiorari seeking review of a judgment of a lower state court which is subject to discretionary review by the state court of last resort shall be deemed in by the state court of last resort shall be deemed in

time when it is filed with the Clerk within 90 days after the entry of the order denying discretionary review.

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Supreme Court, U.S.
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OFFICE OF THE CLERK

No. 93-603

In The

Supreme Court of the United States

October Term, 1993

GARY BEWLEY,

Petitioner,

v.

BRUCE HOWELL, SUPERINTENDENT; INDEPENDENT SCHOOL DISTRICT NO. 1 OF TULSA COUNTY, OKLAHOMA; BOARD OF EDUCATION OF INDEPENDENT SCHOOL DISTRICT NO. 1 OF TULSA COUNTY, OKLAHOMA; JIMMY REEDER; DOUG DODD; JIM PAYNE; VERNON HOBBS; JUDY McINTYRE; WALTER HUSHBECK; individually and as members of the Board of Education of Independent School District No. 1 of Tulsa County, Oklahoma; and CATHY RODGERS, an individual,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION

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RESPONSE TO PETITION FOR WRIT OF CERTIORARI

Respondents, Bruce Howell, Superintendent ("Howell"), Independent School District No. 1 of Tulsa County, Oklahoma (the "Tulsa School District"), Board of Education of Independent School District No. 1 of Tulsa County, Oklahoma, and Jimmy Reeder, Doug Dodd, Jim Payne, Vernon Hobbs, Judy McIntyre and Walter Hushbeck, individually and as members of the Board of Education of Independent School District No. 1 of Tulsa County, Oklahoma (the "Board members"), respectfully request that this Honorable Court deny the Petitioner's request for a writ of certiorari. Petitioner seeks review of a decision of the United States Court of Appeals for the Tenth Circuit that affirmed a summary judgment granted by the United States District Court for the Northern District of Oklahoma. The Court of Appeals properly followed the decisions of this Court in affirming the summary judgment order. As the Court of Appeals stated, under *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257, "[o]nce a properly supported motion for summary judgment is advanced, the nonmovant must come forward with affirmative evidence establishing the presence of a genuine issue of material fact." Petitioner's Appendix 1, p. 3. Because Petitioner failed to present any such affirmative evidence raising a dispute as to any genuine issue of material fact, Respondents were entitled to and were properly granted summary judgment.

This case does not present any important question of federal law, and the decision of the United States Court of Appeals for the Tenth Circuit is not in conflict with the controlling decisions of this Court, another court of

appeals, or a state court of last resort. Respondents respectfully ask that Petitioner's request for a writ of certiorari be denied.

OPINIONS BELOW

See Petitioner's Appendix 1 and Appendix 2.

JURISDICTIONAL STATEMENT

Respondents accept Petitioner's jurisdictional statement.

STATEMENT OF THE CASE

Petitioner's Statement of the Case is replete with factual misstatements and unsubstantiated allegations. Petitioner's counsel in this matter is his sister, and that relationship perhaps accounts for the disregard of the record that is reflected in the Petition for Certiorari. Nevertheless, Respondents cannot and will not allow such misrepresentations to go unaddressed.

The opinions of the Court of Appeals and District Court, which are attached to the Petition for Certiorari at Appendix 1 and Appendix 2, establish the factual background for this action. Petitioner was terminated from an administrative position with Respondent Tulsa School District in June of 1990 following a thirteen (13) hour due

process hearing before the Board of Education. Petitioner's Appendix 2, p. 17. Prior to the hearing, Respondent Howell met with Petitioner to hear his side of the story concerning the allegations against him. Petitioner's Appendix 2, pp. 9-10. Respondent Howell later advised Petitioner in writing that he would recommend Petitioner's dismissal and that Petitioner had the right to a hearing before the Board of Education. Petitioner's Appendix 2, p. 10. Petitioner retained an attorney, and Petitioner and his attorney had over two months to prepare for the due process hearing. Petitioner's Appendix 2, p. 12.

Petitioner's due process hearing was held on June 20, 1990. Petitioner's Appendix 2, p. 13. The administration was represented by the Respondent Tulsa School District's regularly retained attorneys. Petitioner's Appendix 2, p. 10. The administration presented five witnesses, including Cathy Rodgers, who testified that she and Petitioner engaged in an act of sexual intercourse at Will Rogers High School during sixth hour on May 3, 1988. Petitioner's Appendix, pp. 13-14. Cathy Rodgers was a seventeen (17) year old student at Will Rogers High School at the time. Petitioner's Appendix 2, p. 7.

Petitioner was present with his attorney and had the opportunity to cross-examine Cathy Rodgers and all of the administration's witnesses. Petitioner's Appendix 2, p. 15. Petitioner then called twelve (12) witnesses in his defense and ultimately testified himself. Petitioner had the opportunity to tell the Respondent Board members everything he wanted to say in his defense. Petitioner's Appendix 2, pp. 15-17.

At the conclusion of the hearing, the Board of Education voted 5-1 to terminate Petitioner based on a finding that he had engaged in an act of sexual intercourse with a student under the age of eighteen (18). Petitioner's Appendix 2, p. 18.

Petitioner brought this action alleging numerous causes of action, including deprivation of property and liberty without due process, a first amendment "whistle blowing" claim, age discrimination, and various state law causes of action including breach of contract and violation of the Oklahoma Open Meeting Act. The District Court granted summary judgment to Respondents on all of Petitioner's claims. On appeal, Petitioner raised only three (3) issues: deprivation of liberty without due process, the first amendment whistle blowing claim, and qualified immunity. Petitioner's Appendix 1, p. 3. Because Petitioner did not preserve his state law claim of a violation of the Oklahoma Open Meeting Act before the Tenth Circuit Court of Appeals, he cannot raise that issue before this Court.[1] *Delta Air Lines v. August*, 450 U.S. 346, 362 (1981). His allegations at pp. 4 and 7 of his Petition that state law was violated are insupportable and gratuitous.

Petitioner alleges at p. 5 that the Respondents failed to prove by a preponderance of evidence that he committed an act of sexual misconduct with the minor student

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[1] As the District Court pointed out, Petitioner did not even mention the alleged Open Meeting Act violation in his brief in response to the Respondents' motion for summary judgment. Petitioner's Appendix 2, p. 32. Petitioner has *never* presented any evidence to support this allegation.

Cathy Rodgers. Yet the record reflects that both parties characterized the due process hearing as a "swearing match" between Cathy Rodgers and Petitioner. Petitioner's Appendix 2, p. 29. The Respondent Board members heard both sides and believed Cathy Rodgers. Her testimony at Petitioner's due process hearing was ample evidence to support the decision to terminate Petitioner. See Petitioner's Appendix 2, pp. 13-14.

Petitioner asserts that he was "cleared" of this allegation in an investigation in 1988 and later denied access to that "investigatory file." Yet as the District Court observed, the evidence established that the initial decision of Petitioner's immediate supervisor not to pursue the investigation further in 1988 was "based upon an erroneous interpretation of alibi information." Petitioner's Appendix 2, p. 27. Moreover, both the District Court and the Court of Appeals concluded that Petitioner presented no evidence that Respondents had ever denied Petitioner access to any relevant document that he had requested. Petitioner's Appendix 1, p. 4; Petitioner's Appendix 2, pp. 19, 22.

Petitioner discusses his whistle blowing claim at pp. 5-6 of his Petition. He claims that he was terminated because he uncovered a plot to falsify student attendance figures at Will Rogers High School. Petitioner fails to mention that it is undisputed that the Respondent Board members, the decisionmakers who voted to terminate him, were never made aware of Petitioner's so-called whistle blowing. Petitioner's Appendix 1, p. 4; Petitioner's Appendix 2, pp. 21, 30. Furthermore, the undisputed facts establish that Petitioner himself never

mentioned this issue at his due process hearing. Petitioner's Appendix 2, pp. 17, 21. In addition, the District Court found that there was no evidence that the record keeping practices at Will Rogers High School, about which Petitioner purportedly complained, were in any way illegal. Petitioner's Appendix 2, p. 21. Thus, the record establishes that Petitioner "blew the whistle" on a perfectly lawful practice.

Petitioner asserts that Cathy Rodgers has a "lengthy psychiatric history" and has accused "many" men of having sexual relations with her. The record does not support either of these characterizations.[2] However, the salient point is that Petitioner brought both of these allegations to the attention of the Respondent Board members at Petitioner's due process hearing. Petitioner's Appendix, pp. 16, 23. To the extent that they had some bearing on Cathy Rodgers's credibility as a witness, these allegations were for consideration by the Board of Education.

Petitioner alleges that J. Douglas Mann, attorney for Respondents, met with the Board members prior to Petitioner's pretermination hearing and presented evidence that biased the Board against Petitioner. This is an absolute falsehood. There is no evidence anywhere in the

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[2] It is undisputed that another teacher at Will Rogers High School resigned after Cathy Rodgers identified him as the father of her child. Cathy Rodgers stated that she had been seduced by this teacher the year after she was seduced by Petitioner. Petitioner's Appendix 2, pp. 9-10. It is also undisputed that Cathy Rodgers admitted that she had sought counseling from a psychologist. Petitioner's Appendix 2, p. 23.

record to indicate that this occurred. The only evidence that even remotely bears on this point is the deposition testimony of Board member Vernon Hobbs. Hobbs recalled that at some time before the due process hearing, Respondent Howell (not Mann) advised the Board that the media would likely be contacting them regarding a minor student's allegations against Petitioner. According to Hobbs, Respondent Howell told the Board of Education that "he did not have enough information to do anything with at that time, but he was trying to get us notified before the media did . . . " (*see* Appellee's Answer Brief, p. 25, filed January 29, 1993, *Bewley v. Howell, et al.*, No. 92-5215 (10th Cir.), and citations to the record therein). The Court of Appeals, after a *de novo* review of the record, found no evidence of any other pre-hearing meeting. Petitioner's Appendix 1, pp. 5-6. The Court of Appeals found that this meeting was open to the public and that Petitioner had presented no evidence indicating that he was in any way prejudiced by this meeting. *Id.*

Petitioner's fabrications continue when he asserts that Mann, Cathy Rodgers, her mother, and her attorney, Doris Fransein, went into deliberative sessions with the Respondent Board members. This never happened, and Petitioner can point to no evidence in the record suggesting that it did. The District Court specifically noted in its opinion that the attorneys for the Respondents "did not meet with the Board while the Board deliberated or advise the Board in any improper manner." Petitioner's Appendix 2, pp. 28-29.

Petitioner asserts that the Respondent Board members indicated that they placed the burden of proof on

Petitioner to prove his innocence, rather than on the administration to prove the allegations against Petitioner. In fact, the record discloses that all of the Respondent Board members testified that they understood that the burden of proof was on the administration. Petitioner's Appendix 2, pp. 25, 29.

Petitioner contends that Respondents denied him access to the records in his office and had them "boxed up and destroyed" to keep Petitioner from being able to prove his whereabouts on the date and time in question. This is yet another falsehood. The Court of Appeals noted that there was no evidence in the record that the Respondents ever denied Petitioner a document he had properly requested or destroyed any relevant document. Petitioner's Appendix 1, p. 4. The District Court likewise found that no documents had been withheld from Petitioner. Petitioner's Appendix 2, pp. 22-24.

Petitioner states that after his due process hearing he found at his mother's house documents that proved he was breaking up a "girl fight" involving a gun during sixth hour on May 3, 1988. Yet the undisputed facts established that these documents did *not* reflect that anyone was in Petitioner's office during sixth hour on May 3, 1988. Petitioner's Appendix 2, p. 17. These documents do not contradict Cathy Rodgers's testimony in any way. Moreover, as the District Court found, the record shows that these documents were not withheld from Petitioner by Respondents. They were stored in Petitioner's mother's garage at all times. Petitioner's Appendix 2, p. 25. Yet Petitioner did not tell the Board of Education about these documents at his due process hearing. Petitioner's Appendix 2, p. 17.

During the course of this litigation, Petitioner has put forward allegations against Respondents ranging from failure to provide him the appropriate statutory termination procedures under Oklahoma law to discrimination based on age. Petitioner's Appendix 2, pp. 31-32. *None* of Petitioner's allegations has ever been supported by any evidence. Following Respondents' motion for summary judgment, it was incumbent upon Petitioner to present affirmative evidence establishing the presence of a genuine issue of material fact concerning any of these claims. As the opinions of the Court of Appeals and the District Court reflect, Petitioner failed to make such a showing.

SUMMARY OF REASONS FOR DENYING PETITIONER'S REQUEST

Petitioner's request for a writ of certiorari should be denied because this case does not present an important question of federal law. The lower courts properly followed this Court's decisions governing summary judgment practice, first amendment claims, and due process. All of the issues in this case are governed by existing law. Petitioner's request for a writ of certiorari does not raise any important new issues; it is merely an attempt to raise yet again the same baseless allegations that were considered and rejected by the Court of Appeals and the District Court.

Pursuant to Rule 56, FED. R. CIV. P., a party opposing a properly supported motion for summary judgment "may not rest upon mere allegation or denials of his pleading, but must set forth specific facts showing that

there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986). The lower courts properly held Petitioner to this requirement and properly granted and affirmed summary judgment to Respondents when Petitioner failed to make such a showing.

The law governing Petitioner's first amendment claim is equally well established. Pursuant to *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977), Petitioner had the burden of establishing both that his speech was protected *and* that it was a substantial or motivating factor in the action taken against him. Respondents conceded the first point, but Petitioner utterly failed to establish the second.

Finally, this Court has long held that due process requires that any deprivation of life, liberty, or property "be preceded by notice and an opportunity for a hearing appropriate to the nature of the case." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). It is undisputed that Petitioner was terminated only *after* a thirteen (13) hour due process hearing, which in turn was preceded by two months of preparation and discovery by Petitioner and his attorney. Because the Court of Appeals and the District Court followed settled law in disposing of Petitioner's claims, Petitioner's request to invoke the discretion of this Court should be denied.

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

I. The Court of Appeals and District Court Approved Summary Judgment in Favor of Respondents Pursuant to the Guidelines Established by this Court in *Celotex Corp. v. Catrett* and *Anderson v. Liberty Lobby, Inc.*

In *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), this Court defined the standard by which a motion for summary judgment is to be judged:

> In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. *Id.* at 322.

The Court observed:

> One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses, and we think it should be interpreted in a way that allows it to accomplish this purpose. *Id.* at 323-24.

On the same day that *Celotex* was decided the Court also decided *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). In *Anderson*, the Court held that the standard for deciding motions for summary judgment is the same as the standard for directed verdicts. *Id.* at 250. Thus, a properly supported motion for summary judgment should be granted unless there is sufficient evidence in

the record to justify a jury verdict for the non-moving party. As the Court in *Anderson* pointed out:

> The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff. *Id.* at 252.

The record of this case demonstrates that Petitioner failed to present evidence necessary to withstand Respondents' motion for summary judgment. The opinion of the District Court indicates that in his brief in opposition to Respondents' motion, Petitioner responded to only thirteen (13) of the fifty-nine (59) numbered statements of undisputed fact set forth in Respondents' opening brief. Petitioner's Appendix 2, pp. 4-5. Thus, Petitioner admitted[3] all but thirteen of the fifty-nine fact statements relied on by Respondents in seeking summary judgment.

The District Court, in a thorough opinion that meticulously cited to deposition testimony and the transcript of the due process hearing, discussed each of the undisputed material facts relied on by the Respondents and each of Petitioner's alleged statements of disputed fact.

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[3] Local Rule 15B of the Rules of the United States District Court for the Northern District of Oklahoma provides in part:

> A brief in support of a motion for summary judgment (or partial summary judgment) shall begin with a section that contains a concise statement of material facts as to which movant contends no genuine issue exists. . . . All material facts set forth in the statement of the movant shall be deemed admitted for the purpose of summary judgment unless specifically controverted by the statement of the opposing party. Petitioner's Appendix 2, p. 4.

Petitioner's Appendix 2, pp. 5-25. After a fact-by-fact comparison, the District Court concluded that there were no material facts in dispute. This conclusion was affirmed by the Court of Appeals following a *de novo* review of the record. Petitioner's Appendix 1, p. 3.

Petitioner contends that the District Court ignored its duty to view the facts in the light most favorable to him. Yet the opinion of the District Court noted:

> The evidence and inferences therefrom must be viewed in a light most favorable to the non-moving party. . . . Unless Defendants can demonstrate their entitlement beyond a reasonable doubt, summary judgment must be denied . . . (citations omitted). Petitioner's Appendix 2, p. 3.

The Court of Appeals applied the same standard pursuant to its *de novo* review.

Characteristically, Petitioner is totally silent as to any specific fact dispute that the lower courts might have overlooked. He neither identifies nor makes reference to any such error anywhere in the record of this case.

Because the Court of Appeals and District Court correctly followed this Court's decisions regarding the showings necessary in ruling on a motion for summary judgment, and because Petitioner fails to identify any reason that this case merits review other than his own refusal to accept the judgment of the lower courts, Petitioner's petition for a writ of certiorari should be denied.

II. Petitioner Failed to Present Any Evidence that the Respondent Board Members Were Aware of Petitioner's Alleged Whistle Blowing.

The second and third propositions in the Petition for Certiorari relate to Petitioner's first amendment whistle blowing claim. Petitioner appears to argue that such claim is governed by state law. Yet he also characterizes this issue as a "federal question," and goes on to state his third proposition of error as follows: "The Tenth Circuit Court of Appeals has decided a federal question, the right of Petitioner to a jury trial on his state law claims for deprivation of his First Amendment right of free speech, for his termination for vocally refusing to alter attendance records, in a way in conflict with the decisions of the Supreme Court of Oklahoma." Petition for Certiorari, p. 14.

Respondents do not understand Petitioner's argument. The record, however, establishes that the Court of Appeals and District Court addressed Petitioner's first amendment claim. Following its *de novo* review of the record, the Court of Appeals concluded: "There is no evidence that . . . (4) the Board had been apprised of [Petitioner's] alleged 'whistle blowing' activities prior to the hearing." Petitioner's Appendix 1, p. 4. Likewise, the District Court noted:

> The evidence is undisputed that [Petitioner] did not communicate this allegation to the school Board previous to or during the hearing of June 20, 1990. *There is no evidence in the record that the school Board had any knowledge of [Petitioner's] prior "whistle blowing" concerning the average daily pupil attendance funding matter.* [Petitioner] bears

> the burden of showing that his speech was the motivating factor behind the Board's decision, and mere conjecture about the motive behind the official decision is not sufficient to carry the Plaintiff's burden (emphasis added). Petitioner's Appendix 2, p. 30.

Respondents would stress that Petitioner has never shown that there was any illegality or impropriety in the way attendance records were maintained at Will Rogers High School. The District Court concluded that there was "no significant law violation concerning Will Rogers High School's method and way of recording students attendance for funding purposes." Petitioner's Appendix 2, p. 21. Petitioner's speech on this issue did not reveal any wrongdoing by the Respondent Tulsa School District; at most, it disclosed Petitioner's own ignorance about public school enrollment and attendance practices in the State of Oklahoma. This point is discussed in detail in Appellee's Answer Brief, pp. 13-15, filed January 29, 1993, *Bewley v. Howell, et al.*, No. 92-5215 (10th Cir.).

The lower courts' decisions follow well-established law.[4] In *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977), this Court set forth a three-pronged test to determine whether a public employee's first amendment right to free speech has been infringed: (1) the public employee has the burden of establishing as a matter of law that his speech was protected; (2) the employee must demonstrate that the protected speech was a substantial or motivating factor in the action taken

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[4] Contrary to Petitioner's suggestion, Oklahoma law does not control Petitioner's first amendment claims.

against him; and (3) the burden then shifts to the employer to show by a preponderance of the evidence that the employer would have made the same decision even in the absence of the protected speech. *Id.* at 284-287.

Respondents acknowledge that Petitioner's so-called "whistle blowing" is protected speech. But the record establishes that Petitioner failed to meet the *second* prong of the *Mt. Healthy* test, which requires a showing that his speech was a substantial or motivating factor in the Board's decision.

In *Prebble v. Brodrick*, 535 F.2d 605 (10th Cir. 1976), the Tenth Circuit noted that a first amendment claim is not an appropriate vehicle to attempt to overturn decisions made by school officials:

> It was incumbent upon the plaintiff to establish that his exercise of First Amendment rights was the reason for his discharge. . . . Prebble did present some substantial proof of his excellence as an economics professor and that he was a fine person to associate with. . . . But § 1983 is not a vehicle for federal court corrections of errors, committed by school administrators in the exercise of their discretion, not rising to the level of violations of specific constitutional guarantees (citations omitted). *Id.* at 617.

The court made clear that conjecture about the motive behind an official decision is not sufficient to carry the plaintiff's burden:

> Here Prebble's only proof touching on his First Amendment claim was that he had spoken out in some faculty meetings and associated with

> some faculty members who disagreed with their superiors, and with Dr. Pikl, who was replaced. But there was no showing that the defendants objected to this conduct. . . . [H]ere is it only surmise that his discharge was in retaliation for his statements or association (emphasis added). *Id.*

In *Vukadinovich v. Board of School Trustees*, 978 F.2d 403 (7th Cir. 1992), the Seventh Circuit affirmed the dismissal of a terminated teacher's complaint. The teacher was terminated after he had twice been arrested, convicted and incarcerated for alcohol and driving offenses. The teacher claimed, however, that his termination was motivated by his public criticism of the hiring of a new superintendent two years earlier. The Seventh Circuit observed that the teacher had been reemployed for another year after his speech. The court also noted that the teacher never raised his speech claim to the Board of Trustees at his due process hearing:

> Vukadinovich himself did not assert any link between his 1986 comments and his discharge more than two years later – despite repeated opportunities to do so – in fact, until he filed this lawsuit. During the hearing before the Board, Vukadinovich never suggested, or even hinted, that the Board might have been motivated by his 1986 comments. *Id.* at 408.

The court determined that no jury could conclude that the teacher's comments were a factor in the Board's decision to terminate him.

The Court of Appeals and District Court also reached the correct result based on the third prong of the *Mt. Healthy* test. The record shows that the Board terminated

Petitioner based on Cathy Rodgers's testimony that she and Petitioner engaged in an act of sexual intercourse at Will Rogers High School. Clearly, Petitioner would have been terminated regardless of his alleged whistle blowing. In a footnote in *Setliff v. Memorial Hospital of Sheridan County*, 850 F.2d 1384 (10th Cir. 1988), the Tenth Circuit observed:

> We note that in general summary judgment is "an inadequate procedure for sorting out nebulous questions of motivation". . . . Nonetheless, there is ample evidence suggesting that the defendants had reasons for investigating Setliff unrelated to Setliff's speech. By contrast, Setliff's only evidence suggesting retaliation based on his speech are his conclusory allegations of retaliation and the recitation of certain criticisms he directed at certain Hospital practices. That is insufficient to withstand a motion for summary judgment. *See Munson v. Friske*, 754 F.2d 683, 690 (7th Cir. 1985) ("[A]lthough summary judgment is usually not proper in a case involving a weighing of conflicting questions of motive and intent, summary judgment is proper where the plaintiff presents no indication of motive and intent supportive of his position."). *Setliff*, 850 F.2d at 1393, n. 12.

In granting summary judgment to the defendants, the court in *Setliff* noted that the plaintiff had failed "to identify any evidence suggesting a causal link between Setliff's speech and the investigation." *Id.* at 1393. The court concluded by noting, "We require more than pure speculation to defeat a motion for summary judgment." *Id.*

These cases illustrate that the lower courts' decisions rejecting Petitioner's whistle blowing claim are well grounded in existing law.

Petitioner alleges that the Court of Appeals declined to take judicial notice as requested under Rule 201, FED. R. EVID. Petitioner misunderstands the nature of judicial notice under Rule 201, which is limited to "adjudicative facts." Petitioner argues that the Court of Appeals failed to take judicial notice of the law of Oklahoma. This rule, however, does not apply to judicial notice of *laws*, as the Advisory Committee Notes make clear. *See* 21 C. WRIGHT & K. GRAHAM FEDERAL PRACTICE AND PROCEDURE § 5103 (1977). Moreover, the disposition of Petitioner's first amendment claim by the lower courts makes the statutes of the state of Oklahoma regarding student attendance records irrelevant, because Petitioner utterly failed to carry his burden of showing that his speech on the student attendance issue was in any way a motivating factor in the Board's decision to terminate him. Petitioner's judicial notice argument is wholly without merit.

III. The Record Establishes that Petitioner Received All the Due Process Protections to Which He Was Entitled Under the Fourteenth Amendment.

Petitioner completely misunderstands due process analysis under the fourteenth amendment, as evidenced by his attempt to distinguish *Bishop v. Wood*, 426 U.S. 341 (1976). Indeed, Petitioner distorts the District Court's opinion when he suggests that the District Court relied on *Bishop v. Wood* in "granting . . . summary judgment to respondents on all issues." Petition for Certiorari, p. 15.

In truth, the District Court cited numerous authorities in addressing each of Petitioner's many causes of action. It relied on *Bishop v. Wood* only for the proposition that federal courts do not sit to second guess public bodies on the myriad personnel decisions made by such bodies from day to day. The District Court properly concluded that Petitioner could not use his due process claim to retry the *merits* of the decision to terminate him. Petitioner's Appendix 2, pp. 26-27.

Petitioner also fails to understand that the law does not absolutely protect property and liberty interests. The fourteenth amendment is no guarantee against the deprivation of property or liberty. It only insures that such deprivations will not be accomplished without due process of law. *Baker v. McCollum*, 443 U.S. 137, 145 (1979).

The record establishes that Petitioner was terminated following an all-day due process hearing before the Board of Education of Respondent Tulsa School District. Petitioner was represented by counsel, confronted with the evidence against him, allowed to present and cross-examine witnesses, and allowed to present whatever evidence and argument he wanted. Petitioner received more than adequate due process protection.

Petitioner complains that he has been stigmatized as a result of his termination. Yet to the extent Petitioner attempts to premise a liberty interest claim on the outcome of the Board hearing, *which Petitioner himself requested*, his claim is unfounded as a matter of law. In *Clark v. Mann*, 562 F.2d 1104 (8th Cir. 1977), the court discussed a non-tenured teacher's liberty interest claim as follows:

> [W]here derogatory reasons for nonrenewal are incorporated into a record made available to a prospective employer or are publicly announced, the teacher may be said to have been deprived of an interest in liberty. . . . It is important to note, however, that where the reasons for nonrenewal become public information solely by way of a public hearing held at the behest of the teacher, such disclosures cannot form the basis for a deprivation of the teacher's interest in liberty (citation omitted). *Id.* at 1116.

Thus, Petitioner cannot claim a deprivation of liberty without due process simply because stigmatizing information was made public as a result of his due process hearing.

Petitioner also contends that the Respondent Board members were biased against him. This claim was also considered and rejected by the Court of Appeals and the District Court. Petitioner's Appendix 1, p. 4; Petitioner's Appendix 2, p. 28. Petitioner can point to no evidence in the record that supports his allegation of bias. Absent such a showing, this claim must be rejected. In *Hortonville Joint School District No. 1 v. Hortonville Education Association,* 426 U.S. 482, 497 (1976), this Court noted that the law presumes that school board members act with honesty and integrity when discharging their official duties. Because of this presumption, there must be "some substantial countervailing reason to conclude that a decisionmaker is actually biased." *Mangels v. Pena,* 789 F.2d 836, 838 (10th Cir. 1986). There is nothing in the record to indicate that the Board was biased. Contrary to Petitioner's apparent belief, the fact that the Board believed

the evidence against him and voted to terminate him is not evidence of bias.

CONCLUSION

For the reasons stated herein, Respondents pray that Petitioner's Petition for Writ of Certiorari to the Tenth Circuit Court of Appeals be denied.

Respectfully submitted,

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